

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL
WITH PROOF
OF SERVICE

77-61006

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

NATIONAL MUFFLER DEALERS ASSOCIATION, INC.,

Plaintiff-Appellant,

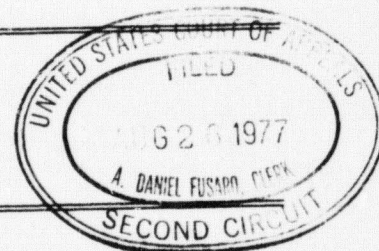
-against-

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX



HOFFBERG, GORDON, RABIN & ENGLER
Attorneys for Plaintiff-Appellant
32 East 57th Street
New York, New York 10022

ROBERT B. FISKE, JR
United States Attorney for the Southern District of New York
Attorney for Defendant-Appellee
One St. Andrew's Plaza
New York, New York 10007

(6489)

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DOCKET ENTRIES
CIVIL DOCKET
UNITED STATES DISTRICT COURT

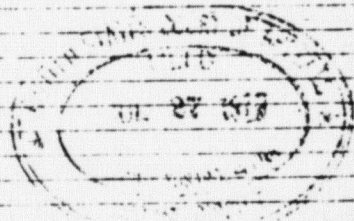
Jury demand date:
Lft. 10-30-75

75 CIV. 2962

D.C. Form N-10 Rev.

FILED

20-1	75-2962	2	570	1	5	ATTORNEYS 0351	8.
For plaintiff:							
NATIONAL INDEPENDENT TAXPAYER ASSOCIATION, INC.					Hoffberg, Gordon, Prutkin & Rabin		
					32 East 57th Street		
					New York, New York 10022		
					(212) 352-2650		
V.							
UNITED STATES OF AMERICA							
6/58					For defendant:		
					U.S. ATTORNEY: U.S.D.C. S.D.N.Y. FOLEY SQUARE, N.Y.C. N.Y. 10007		



STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DNR.
J.S. 5 mailed X	Clerk	JUL 1 1975	52/4/		
J.S. 6 mailed	Marshal				
Basis of Action:	Docket fee				
TAX REFUND ACTION	Witness fees				
Action arose at:	Depositions				

A

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Raymond F. Brighenti
Clerk of the Court

DIV 3228

NATIONAL MUFFLER DEALERS ASSOCIATION, INC. vs. U.S.A.

DATE	PROCEEDINGS
07-01-75	1 Filed Complaint and Issued Summons.
07-11-75	2. Filed summons with marshals return. Served: U.S. ATTY. 7-2-75.
09-11-75	3. Filed stip & order that deft time to answer etc, is extended to 10-2-75, Pierce, J.
10-24-75	4. Filed stip & order that the time for deft U.S. A. to answer is extended to 11-3-75. Pierce, J. U.S. ATTY.
10-30-75	5. Filed defts Jury demand and ANSWER to the complaint.
11-11-75	6. Filed interrogatories and request for documents, by deft, as indicated.
1-9-76	7. Filed stip & order that the time for the pltf to respond to the interrogatories and demand for documents is extended through Jan 15, 1976. Pierce, J.
1-22-76	Filed Pltffs Answers to interrogatories, etc, as indicated.
3-22-76	Filed deft's Affidavit & Notice of Motion, for summary judgment dismissing the complaint, rtble before Pierce, J. on 4-2-76.
3-22-76	Filed defts memorandum of law in support of motion etc, as indicated.
4-5-76	Filed stip & order that the return date of defts motion etc, is extended to 4-23-76. Pierce, J.
4-21-76	Filed Pltffs Affidavit, & Statement purs to Rule 9 G. and Notice of Cross Motion for summary judgment in favor of the pltf, etc, rtble before Pierce, J. on 4-23-76 as indicated.
4-21-76	Filed pltffs memorandum in opposition to defts motion for summary judgment etc, as indicated.
4-23-76	Filed deft reply memorandum of law in support of its motion for summary judgment, etc, as indicated.
5-4-76	Filed Order: Since issues of fact cannot be evolved on motions for summary judgment, the cross motions for summary judgment are denied. Pierce, J. M/N.
7-9-76	Filed Stip & Order that the date for renewal for defts. motion for summary judgment and pltffs. cross motion for summary judgment is adjourned to 7-27-76. same time & place.....Pierce J
8-2-76	Filed stip & order that the time for renewal of defts motion for summary judgment etc, is extended to 8-30-76. Pierce, J.
9-8-76	Filed stip & order that the date for renewal of the parties respective motions for summary judgment is adjourned to 9-20-76. Pierce, J.
10-19-76	Pre-Trial Conference held - Pierce J
3-15-77	Filed Govts. proposed findings of fact and conclusions of law.
3-15-77	Filed Govts. trial memorandum of law.
3-15-77	Filed Pltff's proposed findings of fact and conclusions of law.
3-15-77	Filed Pltff's Pre-trial order.
3-15-77	Filed Pltffs' Trial memorandum.
3-22-77	Filed Pre-Trial order.....PIERCE, J.
5-24-77	Trial begun & concluded without a jury. Court finds for defendant. Judgment to be entered.
5-26-77	Filed order transferring proceedings to the suspense docket until further order.....Pierce, J. m/n
6-6-77	Filed Judgment & Order in favor of deft. dismissing pltff's complaintPierce, m/n. Judgment entered 6-6-77.
6/28/77	Filed notice of appeal to the USCA from the order or J. Pierce dismissing complaint dated 6/6/77 m/n
11-11-77	Final Transcript dated 5-24-77
7-27-77	Filed notice of transmission of record to USCA.

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A-3
SUMMONS

SUMMONS IN A CIVIL ACTION

D. C. Form No. 45 Rev. (4-49)

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 75CW3228

NATIONAL MUFFLER DEALERS ASSOCIATION,
INC.,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon

HOFFBERG, GORDON, FRUTKIN & RABIN,

plaintiff's attorneys, whose address is 32 East 57th Street
New York, New York 10022

an answer to the complaint which is herewith served upon you, within 60 days after service
of this summons upon you, exclusive of the day of service. If you fail to do so, judgement by default
will be taken against you for the relief demanded in the complaint.

[Signature]
Clerk of Court.

[Signature]
Deputy Clerk.

Date: July 1, 1975

[Seal of Court]

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

NATIONAL MUFFLER DEALERS	:	Civil Action
ASSOCIATION, INC.,	:	No.
	:	
Plaintiff,	:	<u>COMPLAINT</u>
	:	
-against-	:	
	:	
UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

-----X

1. Plaintiff, National Muffler Dealers Association, Inc., is a Not-For-Profit corporation organized and existing under the laws of the State of New York with its principal office in the State, City and County of New York, said office being in the Southern District of New York.

2. The defendant is the United States of America.

3. This Court has jurisdiction in this action under the provisions of Section 1346(a)(1), Title 28, United States Code (28 U.S.C.A. §1346(a)(1)).

4. This suit is brought to recover Federal Income Taxes erroneously and illegally assessed against and collected from plaintiff by the District Director of Internal Revenue, Holtsville, New York (hereinafter "District Director") acting for and on behalf of defendant, for the plaintiff's fiscal years, 1971, 1972 and 1973.

5. Plaintiff was organized on January 18, 1971. Its purposes are to protect and promote the interests of parties engaged as franchisees in the business of automobile muffler installation and repair, to promote cooperation among its members and to assist its members in dealing with mutual problems arising from their relationship with their franchisor. Plaintiff's

membership, presently numbering , has been confined to those muffler dealers who are Midas Muffler franchisees.

6. On or about December 29, 1971, plaintiff duly filed with the Internal Revenue Service, on IRS Form 1024, an application seeking a tax exemption as a business league, pursuant to Section 501(c)(6) of the Internal Revenue Code. (Copy annexed as Exhibit A.)

7. On March 28, 1972 said application was denied and, after a District Conference had on October 4, 1972, said denial was confirmed by letter dated June 18, 1974.

8. After receipt of said confirmation, the plaintiff did, on July 22, 1974, remit to the District Director tax returns and payments for the fiscal years, 1971, 1972 and 1973, being in the sums of \$1,237.00, \$1,431.00 and \$2,689.00, respectively. Said payments, totalling \$5,357.00, were each made under protest.

9. On September 24, 1974, the plaintiff did timely file with the District Director, on IRS Form 843, claims for refund of said tax payments, asserting that plaintiff's application for exemption as a business league had been erroneously denied. Said claims set forth the reasons for plaintiff's assertion and copies thereof are annexed hereto as Exhibit B. (Rider to Item K thereof was identical on each claim.)

10. By letter dated March 24, 1975, the defendant notified plaintiff that the claim for a refund for fiscal year 1972 had been disallowed. (Copy annexed hereto as Exhibit C.) ✓

11. More than six months have elapsed since plaintiff filed the aforesaid claims for a refund for fiscal years 1971 and 1973 and it is therefore presumed that said claims have been similarly disallowed.

12. Said disallowances were erroneously made as plaintiff was entitled to tax exemption as a business league pursuant to Section 501(c)(6) of the Internal Revenue Code for the reasons set forth in Exhibit B hereof, which reasons are incorporated herein.

13. As a result of the aforesaid, plaintiff is entitled to a refund of the aforesaid tax payments in the total amount of \$5,357.00, plus interest from the date such payments were made. No part of said amount has been refunded to plaintiff, though duly demanded.

14. Plaintiff is the sole owner of the aforesaid claims, having made no assignment thereof.

WHEREFORE, plaintiff demands judgment against the defendant in the total amount of \$5,357.00, together with interest and costs provided by law, and such other and further relief as to the Court may seem just and proper.

HOFFBERG, GORDON, FRUTKIN & RABIN
Attorneys for Plaintiff

By: _____
Monte Engler
A Member of the Firm
32 East 57th Street
New York, New York 10022
(212) 355-2650

JSS:ais

JURY DEMAND & ANSWER
 UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

75-2264

NATIONAL MUFFLER DEALERS
 ASSOCIATION, INC.,

Plaintiff,

-v-

UNITED STATES OF AMERICA,

Defendant.

JURY DEMAND &
ANSWER

75 Civ. 3228 (LWP)

Defendant, United States of America, by its attorney
 Paul J. Curran, United States Attorney for the Southern
 District of New York, for its answer to the complaint herein:

1. Admits the allegations contained in paragraphs 2, 7, 8, and 10.
2. Denies knowledge or information sufficient upon which to form a belief as to the truth or falsity of the allegations contained in paragraphs 1, 5, 11, and 14.
3. Denies each and every allegation contained in paragraphs 3, 4, 12, and 13.
4. As to paragraph 6, admits that plaintiff submitted an IRS Form 1024 dated December 29, 1971 which was received by the Manhattan District Director of IRS on February 3, 1972, the contents of which speak for itself.
5. Denies knowledge or information sufficient upon which to form a belief as to the truth or falsity of the allegations in paragraph 9 except admits that plaintiff filed Claim Form 843 dated September 19, 1974 for refund of \$1,431.00 for the period from December 1, 1971 to November 30, 1972, which the Manhattan District Director of IRS received on September 25, 1975, and that Exhibit B to the complaint purports to be copies of the claim forms filed with IRS.

FIRST AFFIRMATIVE DEFENSE

6. This court lacks subject matter jurisdiction over this action.

SECOND AFFIRMATIVE DEFENSE

7. The plaintiff fails to state a claim on which relief can be granted.

WHEREFORE, defendant prays for judgment dismissing this action together with costs and disbursements of this action, and for such other relief as is just and proper.

Dated: New York, New York

October 28, 1975.

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for Defendant.

By: S/

JOHN S. SIFFERT
Assistant United States Attorney
Office and Post Office Address:
One St. Andrew's Plaza
New York, New York 10007
Telephone (212) 791-1959

To: Hoffberg, Gordon, Frutkin & Rabin
32 East 57th St
NYC 10022

Attn: Monte Engler, Esq

ORDER DENYING CROSS-MOTIONS FOR SUMMARY JUDGMENT

SJ order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL MUFFLER DEALERS
ASSOCIATION, INC.,

Plaintiff,

75 Civ. 3228

- v -

UNITED STATES OF AMERICA,

Defendant.

ORDER

This is an action for a tax refund. Plaintiff contends that it was erroneously assessed taxes for the taxable years ending November 30, 1971, November 30, 1972, and November 30, 1973, totalling \$5,357.00. Plaintiff association paid the taxes under protest on July 22, 1974 and submitted claims for a refund to the Internal Revenue Service. When those claims were denied, plaintiff commenced this action on July 1, 1975. Jurisdiction is based on 28 U.S.C. §1346(a)(1).

Plaintiff contends that it is exempt from taxation because it is a "business league" as defined in Int. Rev. Code of 1964, §501(c)(6), 26 U.S.C. §501(c)(6)(1970), and the regulations thereunder. In this action, plaintiff is

urging that the IRS denial of its claim was in error and that it is entitled to a determination that it has no tax liability. Presently before the Court are cross-motions for summary judgment.

Plaintiff is an association of 290 franchised Midas Muffler dealers organized under New York Not-For-Profit Corporation Law §402 (McKinney 1970). The certificate of incorporation states that plaintiff was formed "to foster and promote the interests of those individuals . . . engaged in business as muffler dealers . . . [and] to advance the trade and commerce of its members" The original by-laws of plaintiff, dated April 1971, stated that membership was open to "[a]ny muffler dealer holding a valid Midas Muffler franchise" Art. II §1(a). In addition, membership was to be automatically cancelled "in the event that such member no longer retains a valid Midas franchise" Art. II §3(b). The by-laws were amended on October 23, 1972 to expand eligibility for membership by eliminating the word "Midas" from the above-quoted provisions. Nevertheless, it is undisputed that the

membership of plaintiff consists solely of licensed Midas franchisees and that no effort has been made by plaintiff to solicit non-Midas dealers for membership.

It is likewise undisputed that plaintiff was formed to provide Midas franchisees with a bargaining representative in their dealings with their franchisor, Midas International, Inc. One concrete accomplishment of the association has been the negotiation of a more favorable twenty year franchise agreement. Plaintiff also holds an annual convention, affords to members two insurance programs, and publishes a Newsletter containing information of general usefulness to Midas dealers.

Section 501(c)(6) of the Internal Revenue Code provides a tax exemption for business leagues. The applicable regulation interpreting this section is found in 26 C.F.R. §1.501(c)(6)-1 (1975), which provides as follows:

"A business league is an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit Thus, its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons."

Consequently, the organization claiming the exemption has the burden of proving that its primary purpose is the "improvement of business conditions" in a line of business, (here the muffler industry), rather than the performance of services for its members. The fact that the organization is neither organized for profit nor engaged in a traditionally profit-motivated activity does not by itself establish the exemption. Contracting Plumbers Coop. Restoration Corp. v. United States, 488 F.2d 684, 688 (2d Cir.), cert. denied, 419 U.S. 827 (1974).

In deciding whether to grant summary judgment, the Court must determine if any issues of material fact are raised after giving the party against whom the judgment is sought the benefit of all reasonable inferences. The Court on a motion for summary judgment cannot resolve issues of fact. United States v. Matheson, No. 75-6062, slip op. 2279, 2285 (2d Cir. March 3, 1976); Judge v. City of Buffalo, 524 F.2d 1321, 1323 (2d Cir. 1975); Heyman v. Commerce & Industry Ins. Co., 524 F.2d 1317, 1319-20 (2d Cir. 1975). As a result of the application of this test, the Court finds that there is an issue of

material fact present in this case and thus the cross-motions must be denied.

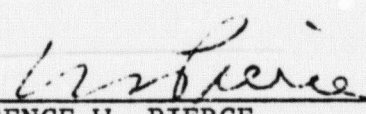
Both parties have submitted Rule 9(g) statements in which they contend that there are no material issues of fact and that the only question raised is whether as a matter of law plaintiff is entitled to the exemption. However, an examination of the papers reveals that there is a material dispute as to whether plaintiff's activities result in the improvement of business conditions in the muffler industry generally. Plaintiff contends that "the word 'Midas' is virtually synonymous with mufflers" As a result, plaintiff contends, "the influence of the Midas chain upon the muffler industry, in general, is pervasive and the activities of the plaintiff have a definite impact upon that industry." (Plaintiff's memo at 10.) In response, the defendant points out that plaintiff's Newsletter is received only by Midas franchisees. As a result, argues defendant, "[i]n no way can its activities be said to have any broader beneficial effect on the 'standards or conditions of a particular trade,' which includes non-Midas muffler dealers or on the community at large." (Defendant's memo at 10, quoting

Produce Exchange Stock Clearing Association v. Helvering,
71 F.2d 142, 144 (2d Cir. 1934)).

Each of the parties' respective positions require underlying findings of fact and neither is supported by the present record. Presently, there is not even any evidence in the record regarding Midas International's share of the market or regarding what proportion of all muffler franchisees belong to the plaintiff's association. A factual determination would be necessary before this Court could determine whether or not plaintiff's activities benefit the muffler industry as a whole. Since issues of fact cannot be resolved on motions for summary judgment, the cross-motions for summary judgment are denied.

SO ORDERED.

Dated: New York, New York
May 3, 1976



LAWRENCE W. PIERCE
U. S. D. J.

md:mg 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

NATIONAL MUFFLER DEALERS
ASSOCIATION, INC., :

Plaintiff, :

v. :

75 Civ. 3228

UNITED STATES OF AMERICA, :

Defendant. :

----- x

B e f o r e:

HON. LAWRENCE W. PIERCE
District Judge

New York, New York
May 24, 1977
10:00 a.m.

APPEARANCES:

HOFFBERG, GORDON & FRUTKIN, Esqs.,
Attorneys for Plaintiff

MONTE ENGLAR, Esq.,
MEYER P. GORDON, Esq., of Counsel

ROBERT B. FISKE, JR.,
United States Attorney
Southern District of New York

PETER C. SALERNO, Esq.,
Assistant United States Attorney

KENT T. STAUFFER,
Assistant United States Attorney

1 md:mg

2

2 (Case called)

3 MR. ENGLAR: Plaintiff is ready.

4 MR. SALERNO: Government is ready.

5 THE COURT: Good morning, counsel.

6 Present for the plaintiff is Mr. Monte Englar,
7 and for the defendant on behalf of the government is United
8 States Attorney Peter Salerno.

9 MR. SALERNO: Yes, sir.

10 Also with me from our office, who will be
11 conducting a portion of the trial, is Mr. Kent Stauffer.

12 THE COURT: Both Assistant United States
13 Attorneys.

14 MR. ENGLAR: With me is Meyer P. Gordon,
15 senior partner in our law firm. Mr. Gordon is both the
16 executive director of the plaintiff association and as
17 such will be testifying as one of our witnesses; he
18 also serves as counsel to the association, and if your
19 Honor has no objection, though I will be trying this
20 case, we would like to enter Mr. Gordon's appearance in
21 the event his counsel is needed during the trial.

22 THE COURT: What do you mean in the event his
23 counsel is needed?

24 MR. ENGLAR: I would like to have him sitting
25

here, your Honor.

THE COURT: No problem with that.

All right.

Why don't we have a brief opening statement by each side of about five minutes, not long. Then we will proceed.

First, Mr. Englar.

MR. ENGLAR: Your Honor, thank you for the five minutes. I daresay I won't need five minutes.

The plaintiff is a trade association whose composition is Midas muffler franchisees throughout the country.

Formed in 1971, in that same year the association made an application for a tax exemption under Section 501(c)(6) of the Internal Revenue Code claiming entitlement to the exemption as a business league.

That exemption was denied, the original basis of denial being that the association was deemed to be nothing more than an arm of Midas, the Midas organization, Midas International, Inc.

The position of the government since that time seems to have gone away from that concept as the pretrial discovery has shown quite clearly that rather than being an arm of Midas, quite to the contrary the

1 md:mg

2 association was formed to create an economic balance be-
3 tween the franchisees of Midas and the parent association
4 or the parent corporation. In fact, the association is
5 oftentimes in opposition to the parent corporation, and the
6 basic premise of the association is indeed the protection
7 of franchisees against the economic might of Midas, as
8 the testimony of Mr. Godon will clearly show.

9 The exemption was denied and a conference
10 was requested by the plaintiff association, a district
11 conference, after which time we had a conference at the
12 IRS down in Washington.

13 After these conferences the exemption was
14 again denied. An application was made for refund,
15 in accordance with the appropriate procedure. Those
16 applications were also denied, and this action was started.

17 The position of the government now appears
18 to be that the fact that the members of the plaintiff
19 association are all franchisees of Midas precludes the
20 granting of the exemption.

21 We take strenuous exception to that.

22 Mr. Gordon's and Mr. Meisgeir's testimony
23 will show quite clearly there is a definite public interest
24 served by the creation of franchisee associations which
25 serve to create or help to create more of an economic

1 md:mq

2 balance between the parent corporation and the franchisee.

3 With franchising as an increasing and multi-
4 billion dollar industry in the United States, and a
5 burgeoning industry within the United States, the exis-
6 tence of franchisee associations will become more and more
7 important to the economy of the United States.

8 The franchisee association is a product of
9 the franchising revolution in much the same way that the
10 labor union was a product of the industrial revolution.
11 The laborer was forced to group together to preclude the
12 abuses of the monolithic, monopolistic, large, economi-
13 cally powerful corporations for which he worked in the
14 same manner as Mr. Meisgeir's testimony will show there
15 is a great need for the franchisees to group together to
16 balance the economic power held by the franchisor.

17 This is in the public interest. We think it
18 is reflective of the public policy of the United States
19 in precluding the consolidation of economic power. We
20 believe the language of Section 501(c)(6), which refers
21 to business leagues and the defining language of business
22 league in the regulation, make it eminently clear that
23 despite the fact that the plaintiff association is com-
24 prised of Midas dealers, it is nonetheless entitled to
25 the exemption.

1 md:mg

2 That is our basic position, your Honor, and
3 we believe that our testimony will quite clearly show the
4 public need and the fact that the statutory and regulatory
5 language entitled us to the exemption which we have
6 requested.

7 THE COURT: Let's see now. You have federal
8 statutes which recognize the role of labor unions in re-
9 lation to employers, recognize the right of collective
10 bargaining, etc.

11 Is there any federal legislation equivalent
12 that you think recognizes the group you have referred to
13 as the franchisees of Midas?

14 MR. ENGLAR: Your Honor, there is presently
15 no legislation, no federal legislation in effect, which
16 we could validly analogize to the statutes to which you
17 have referred. However, there are a number of state
18 statutes in effect, and there is presently pending before
19 the Congress of the United States a bill sponsored by
20 Representative Abner Mikva, known commonly as the Mikva
21 Bill, which would create the right to band together, the
22 right of franchisees to band together, and bargain with
23 the franchisor.

24 THE COURT: In the absence of that legisla-
25 tion being enacted thus far you therefore rely upon what?

1 md:mq

2 MR. ENGLAR: We rely quite simply upon the
3 definition of 501(c)(6) and what we believe to be the
4 legislative intent of that statute which creates an
5 exemption for business leagues, chambers of commerce,
6 real estate boards, boards of trade and similar organi-
7 zations.

8 The Treasury regulation which defines business
9 league -- and we have to turn to the regulation for the
10 definition of business league because there is no statu-
11 tory definition -- is defined in the regulation which is
12 1.501(c)(6), it is defined as -- "An association of
13 persons having some common business interest, the purpose
14 of which is to promote such common interest and not to
15 engage in a regular business of a kind ordinarily carried
16 on for profit."

17 That is the definition of a business league.

18 There is subsequent language which the
19 government has in its briefs submitted to be definitive
20 language. We feel it is nothing more than expansion,
21 example language. We do not feel it is part of the
22 definition of business league.

23 The trade association which is the plaintiff
24 in this case certainly fits the definition of business
25 league. The franchisees have banded together. They are

1 md:mg

2 an association of persons having a common business
3 interest, that business interest being their relationship
4 with Midas. And in that capacity they have absolutely
5 nothing in common with other franchisees or other muffler
6 dealers throughout the country.

7 There are specific problems that flow directly
8 from that relationship.

9 THE COURT: All right.

10 MR. ENGLAR: Thank you, your Honor.

11 THE COURT: Now, Mr. Salerno.

12 MR. SALERNO: Your Honor, I think it is
13 evident from Mr. Englar's presentation that what the
14 association in this case in fact does, if anything,
15 vis-a-vis the entire muffler industry, is to improve
16 the competitive position of Midas muffler dealers.
17 Vis-a-vis its franchisees it may indeed act as a labor
18 union and I think the significance in the revenue code,
19 Section 501(c)(5) labor unions are entitled to exemptions
20 similar to that of business leagues in 501(c)(6).

21 That suggests to me Congress didn't mean
22 everything like a labor union should be exempt but rather
23 it specifically directed an exemption to labor unions and
24 if it wished to offer a similar exemption to franchisee
25 organizations, the need for which plaintiff contends is so

1 md:mq

2 well-known, Congress should enact such tax exemption.

3 Plaintiff's entire argument in fact that I
4 have heard today and have read in the papers is an attempt
5 to urge this Court to expand the meaning of the statute
6 beyond what the cases have clearly construed it to mean
7 on the ground that plaintiff's conception of public
8 interest and public policy requires or makes desirable
9 such a broad construction.

10 No cases held that, for example, mere need
11 for franchisees to group together to equalize their
12 economic balance with their franchisor makes one a business
13 league within the meaning of the statute.

14 No case has held that the mere public interest
15 in the abstract that may somehow result in this rectifica-
16 tion of an imbalance makes one a business league within
17 the meaning of the statute. This rectification in im-
18 balance in the first instance accrues only to the benefit
19 of the franchisees.

20 The public interest comes only very indirectly
21 from I suppose the assumption that what is good for Midas
22 muffler dealers is good for the country but there is no
23 direct connection that can be established.

24 The importance of franchising as a mode of
25 doing business, and the franchising revolution, are

1 ma:mg

2 likewise irrelevant to the question of whether or not
3 an association such as the present is a business league.

4 What the regulation clearly requires, and an
5 issue in this case I think it is fair to state is whether
6 during the tax years in question, which are the years end-
7 ing November 30, 1971, 1972 and 1973, this plaintiff was
8 a business league within the meaning of the statute.

9 That is the only issue.

10 The statute is in turn pretty much definitively
11 controlled by the regulation. The regulation has been
12 inexistence for many years and it does require the activi-
13 ties of an exempt business league should be directed to
14 the improvement of business conditions of one or more
15 lines of business as distinguished from the performance
16 of particular services for individual persons.

17 This Court in its opinion of approximately
18 one year ago, denying the respective party's motions for
19 summary judgment recognized the authoritativeness of that
20 regulation at page 3 of its opinion, and your Honor said,

21 "Consequently, the organization claiming
22 the exeption has the burden of proving that its primary
23 purpose is the 'improvement of business conditions' in a
24 line of business(here the muffler industry) rather than
25 the performance of services for its members."

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1
2 I think your Honor has stated, and stated
3 correctly, that should be the law of this case, that
4 there must be some evidence of a benefit to the entire
5 muffler industry, not merely to a group of franchisees
6 of one franchisor whose activities in fact can only
7 redound to the competitive benefit of Midas dealers and
8 to that extent to the detriment of other muffler dealers
9 who may be in competition with Midas.

10 Quite simply the evidence the plaintiff has
11 offered to produce here shows no evidence whatsoever that
12 the Midas muffler dealers constitute the entire line of
13 business of the muffler replacement industry.

14 The evidence will show at most approximately
15 a 20% share of the market.

16 The government does not concede that even
17 an 80% share of the market or a 90% share of the market
18 would constitute Midas as an entire line of business
19 within the meaning of the regulation, but the fact that
20 even under figures, which the government claims are in-
21 admissible because not gleaned during the time period ap-
22 plicable to this case, even the figures the plaintiff offers
23 shows that other people sell 80% of the muffler replace-
24 ments in this country.

25 THE COURT: All right. Take a minute to

1
2 conclude.

3 MR. SALERNO: I think I have stated what I
4 consider to be the issue to be, and the evidence in this
5 case will not be probative of what the issues are in this.

6 I think your Honor probably also adopted the
7 test which we believe is appropriate. The Second Circuit
8 in Produce Exchange Stock Clearing Association versus
9 Helvering said that there must be a showing that the or-
10 ganization improves the standards of conditions of a
11 particular trade.

12 I think one point neither of us has touched
13 on is that there is a Seventh Circuit case, Pepsi-Cola
14 Bottlers Association case, which is extremely difficult
15 to distinguish from the case at bar and holds against the
16 government. It is not recognized as authoritative by
17 the Internal Revenue Service and we have argued at some
18 length in our memos of law why that case is simply a
19 wrong statement of the law and inconsistent with the law
20 of the Second Circuit as set forth in the Produce Exchange
21 Stock Clearing Association.

22 Thank you, your Honor.

23 One other point for the record, I think.
24 The record does reflect presently in its answer the govern-
25 ment demanded a jury in this case and I wish the record to

1 reflect that we now waive that.

2
3 THE COURT: Mr. Englar, before we go further
4 the organization which is the plaintiff here is limited
5 totally, is it not, to persons -- that is, its member-
6 ship is limited solely to persons who have franchises
7 with the Midas Muffler organization, correct?

8 MR. ENGLAR: It is, your Honor.

9 THE COURT: What is the public benefit that
10 you perceive here? Make an offer of proof on that.

11 MR. ENGLAR: Well, your Honor, the issue
12 of public benefit, if I may, your Honor has in the summary
13 judgment motion decision injected into this case the
14 issue of public benefit, and I will be happy to address
15 that though we have consistently maintained, and I wish
16 to repeat that, our position is that the public benefit
17 criterion established by the Produce Exchange case is
18 really not a requisite to the entitlement.

19 However, with that as a preface, your Honor,
20 the public benefit that we believe flows from the
21 existence of a franchisee association such as the plaintiff
22 is the economic balance which is created between the
23 individual franchisee who otherwise would have absolutely --
24 well, virtually no negotiation or bargaining power vis-a-
25 vis the franchisor and the franchisee.

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2 Well, it is the public policy of the United
3 States as expressed through the various antitrust
4 statutes which --that states that the public policy of the
5 United States is in opposition to situations in which
6 a monopoly or extremely powerful corporation consolidates
7 power, and is able to utilize that power in opposition
8 to the individual entrepreneur.

9 We believe the public is benefited by the
10 fact of the existence of a franchisee association such
11 as the plaintiff encourages individual entrepreneurs to
12 make the necessary investment. We believe that the
13 encouragement of individual entrepreneurial endeavors
14 in this country is a matter of public policy, and the
15 existence of a franchisee association such as Midas,
16 which assures that a franchise won't be terminated in
17 30 days, and which assures that the franchisee will have
18 a certain amount of say in running his business, encourages
19 the individual entrepreneur to make the investment.
20
21
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25

2 There are side benefits we believe which will
3 result from this particular franchisee association as
4 well and we feel that Midas, and our testimony will
5 demonstrate, that Midas is the dominant name in muffler
6 replacement in the muffler industry in the country.

7 The second muffler replacer is far, far be-
8 hind. It is the dominant factor and it is the leader.

9 THE COURT: Harkening back to the public
10 manifest view, do you not find Produce Exchange v. Helvering
11 to have relied upon a public benefit to be essential to
12 a finding that a particular organization is a business
13 league?

14 MR. ENGLAR: Yes, your Honor.

15 THE COURT: Is that not true also of Pepsi-
16 Cola Bottlers Association v. United States, the 7th Circuit
17 case?

18 MR. ENGLAR: Addressing myself first to the
19 Produce Exchange case, as we have outlined in our trial
20 memorandum on pages 10 through 12, the first thing I
21 would like to point out is that the Produce Exchange
22 case -- firstly, I believe we have shown some public
23 benefit and we will be prepared to show more public
24 benefit.

25 Secondly, the Produce Exchange case was

1 rk:mq 2

2 decided in this circuit in 1935, your Honor, making it
3 approximately 42 years old and since that decision more
4 than 42 years ago, we note that Congress has chosen to
5 add to the organization grouping within 501(c)(6) pro-
6 fessional football leagues and we question whether any
7 of the organizations granted an exemption under 501(c)(6) --
8 we are at a loss to recognize what the public benefit is,
9 except indirectly as in the case of the plaintiff, of
10 including a professional football league within 501(c)(6).

11 THE COURT: Nevertheless, Congress has chosen
12 to make that judgment.

13 Did they include a category called -- well,
14 franchisees?

15 MR. ENGLAR: No. In 1913 when the statute
16 was enacted, franchising was a virtually unknown entity.

17 THE COURT: Congress has met each year since
18 then.

19 MR. ENGLAR: Your Honor, it is our position
20 that the term "business league" placed in the statute
21 next to boards of trade and chambers of commerce, indicate
22 quite clearly the Congressional intent to include a fran-
23 chisee association within the context of the statute.

24 Congress did include professional football
25 leagues, as your Honor stated, within the statute, but

1 rk:mg 3

2 nowhere does Congress talk about the public benefit, or the
3 public interest and in the case of Crooks v. Kansas City
4 Hay Dealers cited on page 13 of our memorandum, the Court
5 there said, "The government contends that Congress intended
6 to exempt only such organizations as were devoted entirely
7 to the general welfare. Congress did not say so."

8 So, your Honor, the Produce Exchange rationale
9 about public benefit is at best questionable. It is
10 certainly a case, being 42 years old, that it is hardly
11 contemporaneous.

12 THE COURT: You reject so much of Peps-
13 Cola Bottlers as relying upon a public benefit concept?

14 MR. ENGLAR: We do object to that much of it
15 but we are here to demonstrate a certain public benefit
16 accrues from the existence of these franchisee associa-
17 tions.

18 THE COURT: Mr. Salerno, what do you have to
19 say about that national football league matter?

20 MR. SALERNO: That, your Honor, is made abso-
21 lutely clear in our trial memorandum at page 21. The
22 legislative history, specifically 1966 U.S.S. Code -- it
23 is 21A -- the legislative history of the amendment adding
24 professional football leagues, states that Congress always
25 considered professional football leagues to be business

1 rk:mq 4

2 leagues. That I think indicates that Congress did think
3 they were in the public interest regardless of any
4 incredulity that might otherwise be expressed at that
5 statement. The amendment was not to put professional
6 football leagues into the statute at all and the amendment
7 was simply to make it clear where the football league ad-
8 ministered a pension fund for football players, it was
9 not lost because that would run afoul of the statutory
10 requirement.

11 THE COURT: All right. Thank you.

12 Mr. Englar, call your first witness.

13 MR. ENGLAR: Mr. Salerno and I have agreed
14 we can probably save the Court's time if we introduce
15 all exhibits at this time that have been agreed upon in
16 the pretrial order.

17 THE COURT: Fine.

18 MR. ENGLAR: Exhibit A is a copy of the
19 exemption application filed by the plaintiff dated
20 December 29, 1971.

21 These are all authentic copies.

22 THE COURT: Have these been premarked?

23 MR. ENGLAR: Yes. The defendant has premarked
24 his with letters and I will use numbers.

25 Exhibit 2 is the denial of the exemption

application --

THE COURT: You don't have to identify them.

MR. ENGLAR: 3, confirmation of the denial of the exemption after protest by the plaintiff.

4, refund application -- application for refund of taxes, 1971 through 1973.

5, IRS denial of said refund applications for the year 1972.

6, plaintiff's by-laws, originally dated April 1971.

7, amended by-laws of the plaintiff dated January 1973.

THE COURT: Any objection?

MR. SALERNO: None.

THE COURT: They are all received.

(Plaintiff's Exhibits 1 through 7 received in evidence)

MR. SALERNO: Your Honor, at this time defendants hand up and offer in evidence Defendant's Exhibits A through E with a list of the exhibits.

THE COURT: Any objection?

MR. ENGLAR: No.

THE COURT: They are all received.

(Defendant's Exhibits A through E received in evidence)

1
2 THE COURT: The pretrial order will be consid-
3 ered insofar as it sets forth undisputed facts to be a
4 part of the record in this case?

5 MR. SALERNO: Correct, your Honor.

6 I should state our Exhibit F is not an exhibit
7 we listed in the pretrial order but it is still stipulated
8 to be in evidence. It is the market study about which
9 there will be testimony in this case.

10 MR. ENGLAR: That is right.

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12
13 (continued on next page)
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Gordon-direct

2 MEYER P. GORDON, called as a

3 witness by the plaintiff, being first duly affirmed,

4 testified as follows:

5 THE COURT: Proceed.

6 DIRECT EXAMINATION

7 BY MR. ENGLAR:

8 Q Mr. Gordon, could you please give us your
9 background?

10 A I am an attorney admitted to the bar of the
11 State of New York in 1934, and have been practicing law
12 continuously ever since.

13 Q And your relation to the plaintiff association?

14 A I was instrumental in the organization of the
15 plaintiff association and have been its general counsel
16 and executive director since its inception.

17 THE COURT: In 19 --

18 THE WITNESS: In 1971.

19 Q Would you please outline for the Court the
20 history of the association, including if you will the
21 genesis, the basic reasons, for its formation and your
22 involvement therewith?

23 A Sometime late in 1970 I was called upon to
24 meet with a group of Midas Muffler franchisees.

25 At that time the Midas International Corporation

1 md:mg 2

Gordon-direct

2 was controlled by the Sherman family and a dispute had
3 broken out between the father and son in the Sherman
4 family which led shortly thereafter to a proxy fight.

5 In the initial stages of this dispute the
6 franchisees were tremendously concerned about their future
7 and about what might happen to them as a result of this
8 dispute, and they called me in and talked to me about
9 organizing a trade association of the franchisees.

10 Shortly thereafter I did proceed to organize
11 the plaintiff corporation as a not-for-profit corporation
12 under the laws of the State of New York, and several of
13 the franchisees undertook an organizing campaign.

14 In March of 1971, I met with a group of the
15 franchisees and I prepared a set of by-laws and the
16 organization was actually -- became a reality in March
17 of 1971, and we proceeded to do two things, which was to
18 continue organizing the association and at the same time
19 attempting to get recognition from the parent organization,
20 Midas International.

21 We made various demands regarding a better
22 franchise agreement, various other matters which we
23 considered to be as defects in the franchise program as
24 it then existed with Midas.

25 For instance, at that time the chief problem

1 was that the franchise agreement was a 30-day agreement.
2 In other words, it could be canceled by either the
3 franchisee or franchisor on 30 days' notice. Naturally,
4 the franchisees were tremendously concerned, not only
5 by the actual form of the agreement, but by the both
6 implied and sometimes overt threats of cancellation which
7 were used by the parent corporation against the franchisees.
8

9 So we demanded to the extent we were able to
10 demand a new franchise agreement, a long term franchise
11 agreement.

12 There was a problem about succession, if
13 somebody died or became disabled, the franchise as it then
14 existed was automatically canceled in the event of the
15 death or disability of the franchisee or the chief officer
16 of the franchisee if it were a corporation.

17 The right of sale was terribly limited, and
18 there were situations where the franchisees attempting to
19 sell their businesses found obstacles put in their way
20 by Midas employees who presumed to dictate the amount
21 of money they could get and to whom they could sell.

22 These were typical of some of the things that
23 we attempted to tackle.

24 Q During the period since the initial activities
25 of the association, Mr. Gordon, can you briefly describe

1 md:mg 4

Gordon-direct

2 some of the accomplishments of the association?

3 A Yes. The first thing that we were able to
4 accomplish was a completely new franchise agreement.
5 Actually, it was preceded by a sale of the Midas franchise
6 to a large conglomerate, I.C. --I think those initials
7 stood for Illinois Central, which is still the owner of
8 the Midas business, the parent company. In response --
9 I hope it was in response to our requests, Illinois
10 Central did produce a proposed new franchise agreement.

11 I was able, representing the franchisees,
12 to negotiate with the Midas organization and make a sub-
13 stantial number of changes in the proposed new agreement.
14 What came out of it was what I consider almost a model
15 franchise agreement.

16 We got a full 20-year franchise. It
17 specifically may not be canceled except for cause, which
18 is specifically set out, the type of cause, the provisions
19 as to cancellation are specifically set out. There is
20 a provision for arbitration in the event that there is
21 disagreement as to whether or not there is adequate cause
22 for cancellation.

23 There is provision in the agreement for
24 succession. There is provision in the agreement for a
25 sale of the franchise with Midas having the right to pass
upon the proposed buyer. However, its consent to such

1 md:mg 5

Gordon- direct

2 a sale may not be unreasonably withheld. And again in
3 the event of a disagreement, there is a provision for
4 arbitration.

5 All of this was accomplished in the years
6 1971-1972.

7 Q Going beyond the contract, the new franchising
8 agreement which you negotiated, has the association had
9 any other accomplishments, served any other function, vis-a-
10 vis Midas?

11 A Are you limiting it, Mr. Englar, to Midas at
12 the moment?

13 Q Yes.

14 A With Midas we subsequently negotiated with
15 Midas for a change in the policy regarding muffler re-
16 placements. One of the strengths of the Midas program
17 has been for many years that it advertises that it will
18 replace your muffler during the life of the car.

19 For some years before 1972 this was subject
20 to a service charge. The dealer received some portion
21 of the new muffler cost from Midas and then added on a
22 service charge to the customer.

23 The plaintiff association sought the elimination
24 of the service charge as a benefit to the public as well
25 as, of course, a benefit to Midas.

1 md:mg 6

Gordon - direct

2 The question was what kind of reimbursement
3 would the dealers get if they gave up their service charge.
4 We did negotiate with Midas and we worked out a deal
5 whereby the reimbursement margin started at 75% of the
6 cost of the new muffler in the first nine months or
7 first year of the program, and escalated so that beginning
8 July 1, 1976, the franchisees were entitled to 95% re-
9 imbursement of the cost of the new muffler, and that has
10 been in existence since then.

11 As a result, the service charge was dropped
12 back in 1972.

13 THE COURT: So that the customer today,
14 having once purchased and paid for the installation of
15 a Midas muffler, upon finding that that muffler is in
16 need of repair or replacement can now get it repaired and
17 replaced without any additional charge whatsoever?

18 THE WITNESS: That is correct.

19 THE COURT: That is since when?

20 THE WITNESS: That began sometime in 1972,
21 to the best of my recollection. I have some documents
22 possibly that refer to it, but it was around that time.
23 ~~And it has been in existence since that time.~~

24 THE COURT: Totally abandoned, the service
25 charge has now been totally abandoned?

1 md:mg 7

Gordon - direct

2 THE WITNESS: That is correct.

3 A One of the other problems came about as a
4 result of what we considered - - when I say "we," I am
5 talking about the association -- considered a substan-
6 tially higher price for pipes from Midas and could be
7 obtained from competition, and we negotiated with Midas,
8 and I think this came about in 1974 or 1975 --

9 MR. SALERNO: I object to anything outside
10 the tax years in question, your Honor.

11 THE COURT: I will take it.

12 A We have negotiated this reduction in pipe
13 prices. We have a commitment from Midas that these
14 prices will remain competitive, and in fact we have
15 instituted recently our own computer programming to
16 monitor the prices of Midas versus the prices of competi-
17 tors to make sure that they are competitive and that they
18 are kept low within the market. These are the prices from
19 Midas to the franchisees. We have been --

20 THE COURT: Just a moment. And consequently
21 the price from the franchisees to the customers was
22 affected accordingly?

23 THE WITNESS: Naturally.

24 I want to make sure your Honor understands
25 we are talking here about pipe versus mufflers. The

1 md:mg 8

Gordon- direct

2 muffler is only one segment of the exhaust system, and
3 the pipes are in addition, so that we are only talking
4 here about pipe.

5 We have recently become tremendously con-
6 cerned about a problem that I have seen in various other
7 franchise organizations which is proliferation --

8 THE COURT: You better not tell me about some-
9 thing that represents a recent concern preceding the
10 period in question.

11 THE WITNESS: Very well, sir.

12 MR. ENGLAR: May I be briefly heard on that
13 point? As the pretrial order reflects, the government
14 and the plaintiff have significantly different opinions
15 as to what the issues in this case are. The government
16 would limit the issue to whether or not plaintiff is
17 entitled to tax refunds for any of the fiscal years ending
18 November 30, 1971, 1972 or 1973.

19 We believe, and we believe it is a matter
20 which will assist the administration of this entire de-
21 cision so that we don't have to come back for periods
22 after that time, that the issues are much broader and
23 that they include the association's activities such as
24 to qualify it as a business league within the definition,
25 and as a subissue if the plaintiff is otherwise entitled

1 md:mg 9

Gordon-direct

2 to that exemption as a business league, does he lose it
3 merely because it is comprised of Midas dealers.

4 We believe the issues are far broader than
5 the government would have the Court hold, and if your
6 Honor is in accord with the plaintiff's view as to the
7 issues, I submit respectfully that the testimony of
8 Mr. Gordon as to present activities, recent activities,
9 are every bit as relevant as the activities in the past,
10 as they are reflective of the nature of activities ac-
11 complished and undertaken by the association.

12 THE COURT: No.

13 MR. ENGLAR: Thank you, your Honor.

14 Q Mr. Gordon, going beyond the accomplishments
15 or functions of the association vis-a-vis Midas, are
16 there other functions or accomplishments of the plaintiff
17 association?

18 A Yes. Some years ago the association intro-
19 duced a group, a series of group insurance programs. We
20 have a group life and health program, we have a group
21 casualty and workman's compensation program, all with
22 experience based upon the group experience of the Midas
23 dealers, at a reduced cost to what it would be otherwise
24 available and subject, of course, to dividends in the
25 event of a favorable experience among the Midas dealers

1 md:mg 10

Gordon-direct

2 themselves.

3 THE COURT: Is it limited to people who have
4 franchises with Midas Muffler?

5 THE WITNESS: Yes, sir.

6 Not only that, it is limited to people who
7 are members of the association.

8 THE COURT: So that you could have a franchise
9 but not be a member of the association, and consequently
10 you would not be able to participate in this?

11 THE WITNESS: That is correct.

12 In addition, the association publishes a
13 newsletter on a fairly regular basis, as often as once
14 a month, but it is not that regular, in which the associ-
15 ation tells its members what it has accomplished in
16 dealing with Midas, it exchanges information with them
17 as to what is going on with Midas and among the members
18 themselves. We have had hints and helps from members
19 to others, how best to conduct their business.

20 Along the same lines, we have had an annual
21 convention ever since 1971 at which we have speakers from
22 both the outside and the inside, and seminars among the
23 members in which they discuss in-shop problems, advertising
24 problems, and problems of that sort.

25 THE COURT: Let's go back to the 20-year

1 md:mg 11

Gordon-direct

2 franchise that you worked out. You described it as a
3 model type of agreement for franchisees, and you were
4 able to obtain provision for arbitration and succession
5 and various other provisions which you have indicated
6 benefit franchisees.

7 To what extent has that franchise agreement
8 worked to enhance the position of people similarly
9 situated, if at all?

10 THE WITNESS: Thsu far it has had rather
11 little impact, although we have not hesitated to publi-
12 cize the fact, and I must for this talk about something
13 that happened only within the past year, sir.

14 THE COURT: Yes.

15 THE WITNESS: That was an organization which
16 is in the process of formation called the National
17 Franchise Association Coalition, and the executive
18 director, Mr. Meisgeier, is in court here now and will
19 testify.

20 We have attended some of those meetings.
21 We have not as yet joined. But here are groups of
22 franchisees, executive committees and officers of fran-
23 chisees getting together and I have personally spoken at
24 those meetings about the Midas franchise and have been
25 the subject of considerable envy of Midas dealers.

1 md:mg 12

2 What the end result of that will be I don't
3 know.

4 THE COURT: Take those who are franchisees
5 with Midas who are not members of your association, they
6 have benefited from that agreement, isn't that so?

7 THE WITNESS: They certainly did.

8 THE COURT: What about the negotiation which
9 led to 95% of the cost of the new muffler being re-
10 imbursed to franchisees where replacement of mufflers
11 occurred?

12 THE WITNESS: Did nonmembers benefit equally?

13 THE COURT: That is the question.

14 THE WITNESS: Yes, sir.

15 THE COURT: They do?

16 THE WITNESS: There is no question about it.
17 They do. There is no question about it; under the law
18 there can't be unequal treatment. Nevertheless I point
19 out but for the association these accomplishments would
20 not have taken place at all.

21 THE COURT: Similarly, when you negotiated
22 the price of pipes downward so that the price would be-
23 come competitive as you have described it, that benefited
24 those who were Midas franchisees but who were not members
25 of the association?

mdmg 13

Gordon-direct

THE WITNESS: That is correct.

But I should point out, your Honor, that as of today over 80% of the shops in the Midas program are members of the association.

THE COURT: What does that add up to in round numbers?

THE WITNESS: The number of shops, about 620 shops are members of the association, and whatever 81 or 82% that is of, that's the other figure. I just don't have it in mind at the moment. A total of perhaps 750 or 800 shops.

THE COURT: Only the members of the association can benefit from the group life insurance and health insurance programs, is that right?

THE WITNESS: That is correct.

THE COURT: Who receives the newsletter? Members? Nonmembers?

THE WITNESS: We have in the past from time to time sent it to nonmembers merely as a way of inducing them to join.

THE COURT: But not consistently?

THE WITNESS: Not as a regular matter. As a regular matter we send it to members only. However, we have an arrangement with Midas whereby the reports of

1 md:mg 14

Gordon-direct

2 the-- if I may call them negotiation sessions with Midas
3 are publicized either by us or by Midas so that the non-
4 members know what is going on.

5 There is a formal committee which we have
6 designated National Muffler Dealers Advisory Committee,
7 which is the executive committee of the association which
8 meets with Midas officials on a regular basis, and that
9 advisory committee is the one that does the negotiation,
10 and I am always present at all of these sessions.

11 Q Mr. Gordon, I gather from recent comments
12 that the association has come a long way. Is the
13 association presently recognized by Midas as a negotiating
14 arm?

15 A I don't think Midas would like the idea of
16 calling it negotiating, but nevertheless some years ago
17 I and some members of the association's executive committee
18 met with the president of Illinois Central, or a vice
19 president, and then new president of Midas, and received
20 official recognition and a joint bulletin was issued
21 shortly thereafter in which they recognized the association.

22 More important, I think, Mr. Englar, is the
23 fact that we have a commitment from Midas that there will
24 be no activity of any kind in the Midas program which
25 affects the profitability of dealers without discussing it

1 md:mg 15

Gordon-direct

2 with the association.

3 Q Mr. Gordon, Exhibit 2, Plaintiff's Exhibit 2,
4 which is the denial of the application, initial applica-
5 tion for exemption as a business league, states in the
6 second paragraph that the section would not apply to an
7 organization that is not industrywide.

8 And then I quote: "As your association is
9 organized and operated for the benefit of the Midas
10 organization, you fall beyond the scope of Section 501
11 (c) (6)."

12 Is the association organized and operated
13 for the benefit of the Midas organization?

14 A Quite the contrary. Some of the programs
15 obviously must accrue to the benefit of the parent Midas
16 organization, but the entire purpose of this association
17 has been to redress what I have seen for some years as an
18 economic imbalance between individual franchisees and
19 large franchisors, and to the extent that we have
20 bargained with and negotiated with Midas on the various
21 matters I have testified to, we have been in opposition
22 to Midas.

23 Q Are the problems to which the association
24 addresses itself problems which are shared by others in
25 the muffler industry?

1 md:mq 16

2 A No.

3 Q How would they differ?

4 MR. SALERNO: I object to that, your Honor.

5 THE COURT: I will take it.

6 A There is no organized competition worth talk-
7 ing about in the exhaust system business, the exhaust
8 after-sale business. There are various groups, and I
9 think Mr. Kaden is probably in a better position to tell
10 you about them, that do exhaust system work, but the only
11 large one, and none approaches Midas, is Midas with, as
12 I indicated, that many outlets across the country, so
13 that their problems are totally different.

14 They are different first because they have to
15 deal with a powerful franchisor, a large public conglomer-
16 ate, and they are different because in the second case,
17 as the leader, they have to take advanced positions and
18 are generally followed by other muffler dealers.

19 For instance, when we eliminated the service
20 charge on the guarantee muffler dealers of all kinds all
21 over the country had to follow suit, and it has now become
22 standard that the public gets the benefit of having their
23 mufflers replaced without charge.

24 MR. SALERNO: I move to strike all this.

25 There is no foundation for the witness' factual knowledge

1 md:mg 17

Gordon-direct

37

2 or the pure conjecture that this has any effect outside
3 Midas Mufflers alone.

4 THE COURT: Sustained. Strike it.

5 THE WITNESS: May I explain what the basis
6 of my knowledge is, your Honor?

7 THE COURT: No. But counsel can offer it if
8 he has hard evidence to support it.

9 MR. ENGLAR: Your Honor, the evidence that I
10 have to offer for -- the evidence that we have to offer
11 for the effect of the -- of the extra effect of the
12 Midas activities is within the knowledge of our witness,
13 if your Honor will hear the testimony and reserve decision
14 on the objection until such time as the foundation can
15 be heard from the witness' mouth.

16 THE COURT: Why don't you lay the foundation
17 first?

18 MR. ENGLAR: May I have the objection read
19 again?

20 THE COURT: Just consider the objection,
21 whatever it was, sustained, and start over. You have
22 not laid a foundation yet at all.

23 Q Mr. Gordon, as a result of your activities
24 within the Midas organization -- within the plaintiff
25 association and its activities vis-a-vis Midas, have you

1 md:mg 13

2 obtained any exposure, any knowledge, of the muffler
3 industry in general?

4 A I have.

5 Q What is the basis of that knowledge, and that's
6 the exposure?

7 A Midas dealers around the country keep me in-
8 formed or keep the association informed of what is going
9 on with competition. I get copies of advertisements,
10 I get oral reports from dealers around the country as to
11 what the competition is and is not doing. As a result
12 I have been able to find out exactly what is happening
13 around the country with respect to people dealing in
14 mufflers.

15 MR. SALERNO: It is evident the witness'
16 entire knowledge is based on hearsay and therefore we
17 object to any statements based on that.

18 MR. ENGLAR: By the very nature of the case
19 that we are presenting empirical evidence other than --
20 I mean evidence other than empirical evidence that comes
21 from observation, meetings, negotiations, is unavailable;
22 this is not an area in which there is a large body of
23 statistics to which we can refer.

24 The area about which we are trying to intro-
25 duce evidence now relates to a general business atmosphere,

1 an atmosphere of which anybody involved in the industry
2 would naturally become aware, and exchange that informa-
3 tion. This is not something that we can pick up and
4 cite to numbers and statistics.
5

6 Mr. Kaden has a certain amount of that in-
7 formation but the exposure of Mr. Gordon is certainly
8 sufficient to enable this testimony, we submit, to be
9 admitted for the value that your Honor might place on it.

10 THE COURT: Objection sustained.

11 Q Mr. Gordon, is the plaintiff association
12 organized for profit?

13 A It is not.

14 Q Do any part of the net earnings of the as-
15 sociation inure to the benefit of any individual?

16 A They do not.

17 Q Does the association have any stockholders?

18 A It does not.

19 Q Mr. Gordon, you have testified that your ex-
20 posure to the industry has led you to certain -- has
21 allowed you to have certain observations about the
22 industry.

23 Do you ascertain any public benefit which has
24 accrued as a result -- which has resulted from the activi-
25 ties of the association?

1 md:mq

2 MR. SALERNO: Objection. There is no basis
3 for such opinion evidence.

4 THE COURT: Sustained, so far.

5 You may approach it in some other fashion.

6 Q Mr. Gordon, has the plaintiff association
7 succeeded in redressing what you have termed the economic
8 imbalance between the Midas franchisee and the franchisor?

9 A To a limited extent; limited only by the
10 fact that the franchisor is still largely in control of
11 an organization such as the Midas organization, and
12 even though the Midas officials talk to us and negotiate
13 with us, if you will, in many cases the ultimate decision
14 is that of Midas.

15 Short of attempting to seek redress in the
16 courts, or through some economic sanctions, which we would
17 prefer not to consider, we are in a constant uphill fight
18 against Midas in attempting to redress that economic im-
19 balance.

20 We have succeeded to a great extent but not
21 entirely.

22 MR. ENGLAR: I have no further questions,
23 your Honor.

24 THE COURT: You may inquire.

25 MR. SALERNO: May I have just one moment to

md:mq

Gordon- cross

11

1 consult, your Honor?

2 THE COURT: Yes.

3 CROSS-EXAMINATION

4 BY MR. SALERNO:

5 Q Do you have any knowledge of the percentage
6 of Midas dealers in the country who were members of the
7 plaintiff association in 1971, 1972 and 1973?

8 A Yes.

9 Q What is that knowledge?

10 A Starting from the beginning we ran better than
11 50% of the shops. I prefer to deal with shops because
12 there are some members who have multiple shops. Start-
13 ing right from the beginning we had more than 50% of the
14 shops, and each year it has been growing to where it is
15 now.

16 Q Do you have any knowledge of what the per-
17 centage was on November 30, 1973, or about that date?

18 A Not with me. I am sure that the records will
19 reflect that, if it is important.

20 Q Is it less than the present 80% that you have
21 testified to?

22 A What date did you say?

23 Q November 30, 1973.

24 A Yes, today the percentage is the highest that
25

1 md:mq

2 it's been.

3 Q The percentage has been continually increasing?

4 A That's correct.

5 THE COURT: You are saying that since
6 November 30, 1973 until today it has been continuously
7 increasing?

8 THE WITNESS: That is correct.

9 Q Mr. Gordon, do you consider Midas Muffler
10 shops to be part of the Midas organization?

11 A I don't understand your question.

12 Q You testified in connection with Plaintiff's
13 Exhibit 2, you were asked a question when your counsel
14 read to you the language that the Internal Revenue Service
15 had written where it says, "Since your association is
16 organized and operated for the benefit of the Midas
17 organization you fall beyond the scope of Section 501(c)(6)."

18 Then you were asked the question, Mr. Gordon,
19 as to whether or not your association is organized and
20 operated for the benefit of the Midas organization, and
21 you answered "No" to that question.

22 Now, I want to ask you what definition of
23 the word "organization" you had in mind when you answered
24 "No" to that question.

25 A The parent company.

1 md:mq

2 Q I see.

3 Do you know whether or not the person who
4 wrote this letter had the parent company in mind when he
5 used the word "organization"?

6 A No.

7 Q It is possible, is it not, that when the
8 Internal Revenue Service said that your association is
9 organized and operated for the benefit of the Midas
10 organization he meant solely Midas Muffler shops, is it
11 not?

12 A Not after speaking to at least two conferees
13 of the Internal Revenue Service, no.

14 Q What did they say to you?

15 A I understood them to say that they meant that
16 we were organized to promote the parent organization.

17 Q It is true, is it not, that your activities
18 only benefit Midas Muffler dealers, is it not?

19 A No, it is not true at all. It benefits
20 the public to a great extent as well as Midas Muffler
21 dealers.

22 Q Your newsletters are circulated only to Midas
23 Muffler dealers, correct?

24 A Correct.

25 Q As you testified on direct your life insurance

1 md:mg

2 program is even limited to members of your association,
3 is that not so?

4 A Correct.

5 Q You didn't negotiate franchise agreements on
6 behalf of non-Midas Muffler dealers?

7 A They all got it.

8 Q I said non-Midas.

9 A Obviously not. They are not part of the Midas
10 program.

11 Q So that your activities then do benefit the
12 Midas program, is that not so?

13 A Sir, I don't want to quarrel with you, but
14 you asked me before are they solely for the benefit of
15 the Midas dealers and my answer is no, and my answer is
16 still no.

17 MR. SALERNO: I have no further questions.

18 THE COURT: Any redirect?

19 MR. ENGLAR: No.

20 THE COURT: Step down.

21 (Witness excused)

22 THE COURT: Call your next witness.

23 We will swear the witness in and then take a
24 brief recess.

25 MR. ENGLAR: Mr. Gil Meisgeier.

1 md:mg

2 G I L B E R T A L V I N M E I S G E I E R,

3 called as a witness by the plaintiff, being first
4 duly sworn, testified as follows:

5 THE COURT: We will take a brief recess.

6 (Recess)

7 THE COURT: Let's resume.

8 DIRECT EXAMINATION

9 BY MR. ENGLAR:

10 Q Mr. Meisgeier, what is your position, please?

11 A Executive Director of the National Franchise
12 Association Coalition.

13 Q What is the National Franchise Association
14 Coalition?

15 A The coalition is the group of currently 20
16 franchisee associations who have banded together for
17 their self-protection, so to speak, mainly to act as a
18 clearinghouse for information from respective franchisee
19 associations as far as abuses suffered from the
20 usually economically mighty franchisor companies.

21 Q What is the history of the coalition, its
22 development, and its longevity?

23 A The coalition was put together in November
24 1975 at the request of six of the current participating
25 associations to support federal legislation that would

1 md:mq

2 reduce franchising abuses.

3 Q What is your background and your relation-
4 ship? How did you get involved with the coalition?

5 A I had been executive director of the
6 McDonald's Restaurant Operators Association and I am also
7 currently in the same capacity and also the Dunkin'
8 Donut Operators Association.

9 Q How did you get involved with the National
10 Franchise Association Coalition?

11 A As one of the participating directors of the
12 initial group of franchisee associations I represented
13 I would have to say I was drafted as their executive
14 director.

15 Q You have mentioned one of the functions of the
16 coalition is to act as, I believe you used the term
17 "clearinghouse," for franchisees to note the problems
18 they have with franchisors and some of the abuses that
19 they suffer at the hands of the franchisor?

20 A Yes.

21 Q What are some of the abuses?

22 A Unjust termination, cancellation of franchise
23 agreements, failure to renew without just cause being
24 present, price fixing, illegal time arrangements, forced
25 purchases from suppliers selected by the franchisor

1 mcl:mq

2 companies. Things of that nature.

3 Q What do you do with this information when
4 it is received?

5 A The information is generally made available
6 to all participating associations or any franchisee.
7 Coalition is open to any franchisee who wishes to partici-
8 pate as an associate member. We attempt to represent
9 the best interests of the participating franchisees or
10 associations again in view of the overwhelming might of
11 the franchisor companies.

12 What unfortunately happens in franchising
13 starts with somebody's concept who lacks the financial
14 wherewithal and the talent to go into a chain type of
15 system so they franchise it and take on a partner, and
16 at the outset of the agreement it goes through the honey-
17 moon phase where they help one another amicably to get
18 started. As the franchisor's economic might develops
19 they use it against the individual franchisees, and with-
20 out an association and without the franchisees banding
21 together for their own best interests, everybody would
22 suffer, including the public.

23 MR. SALERNO: I move to strike all this on
24 the relevance grounds.

25 Mr. Meisgeier's activities began in 1975

1 md:mq

Meisgeier- direct

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2 and so far he is testifying about an entirely different
3 type of organization and a general need for organizations
4 such as franchisee associations.

5 THE COURT: Denied.

6 MR. ENGLAR: May I have the last answer read
7 back?

8 (Record read)

9 Q As a result of your exposure and contact with
10 the coalition, Mr. Meisgeier, did you become familiar
11 with the functions served by the individual member as-
12 sociations, the franchisee associations?

13 A Yes, I have.

14 Q Briefly what are those functions, if they have
15 anything in common?

16 MR. SALERNO: May we have a foundation laid?

17 THE COURT: Yes.

18 Q In what manner have you become familiar with
19 this?

20 A Through various seminars that the coalition
21 has sponsored across the country and various meetings of
22 franchisee groups. We have seminars where we analyze
23 franchise agreements of various franchising companies,
24 take that into consideration when attempting to negotiate
25 new franchise agreements for respective members.

1 md:mg

2 MR. SALERNO: I object on the grounds it
3 sounds like all the knowledge is based on hearsay. It
4 is hard to tell from the answer, but it sounds that way.

5 MR. ENGLAR: If I may, I would like to ask
6 some more questions to lay that foundation.

7 THE COURT: Let's hear your foundation ques-
8 tions.

9 Q Are you familiar through your capacity as
10 director of the coalition with any number of the agree-
11 ments, the franchising agreements of the member franchisees?

12 A Yes, I am.

13 Q Are you familiar with any changes that might
14 have come about as a result of their efforts?

15 A Yes, I am aware of those changes.

16 Q Are you familiar with any other documentation
17 other than conversations that you have at seminars which
18 would be reflective of the accomplishments of these as-
19 sociations?

20 A Yes, case histories of litigation that have
21 been before the courts.

22 MR. ENGLAR: May the witness proceed, your
23 Honor? I believe he has sufficient knowledge.

24 THE COURT: It depends on what you want to
25 ask him.

There is no documentation to look for, there

1 md:mg

2 is no -- this is a new and rapidly developing area of the
3 law.

4 MR. SALERNO: Your Honor, it still seems
5 to me, first of all, we don't know how Mr. Meisgeier
6 became familiar with these documents. We assume he read
7 some of the documents. The problem is he learned of
8 some of them through hearsay.

9 More to the point, it is still clear the offer
10 of proof is that franchisees need franchisee organizations.
11 The offer of proof cannot conceivably show that the public
12 needs franchisee organizations except insofar as we ap-
13 prove of laissez faire capitalism, or something like that.

14 All we are talking about through this witness
15 is the perhaps self-evident fact that franchisees need
16 franchisee organizations to redress the economic imbalance
17 of the franchisor.

18 That is not the test to meet the regulation.

19 THE COURT: Maybe if I tell you how I try
20 a case it will help you to know what it is you have to
21 present here in order to proceed.

22 I like to try a case so that if the matter is
23 appealed by the losing party, the Court of Appeals judges
24 who get the matter and have to go through the record in
25 order to decide what was the proper thing to do in the

1 md:mg

2 case finds a complete record.

3 I don't question that Mr. Meisgeier is very
4 knowledgeable about all this; that is, I don't personally
5 question it. But if you think in terms of the record,
6 and what the record reveals in this regard, it requires
7 a great leap for me to assume it for purposes of admit-
8 ting what it is you wish to get received in evidence.

9 All I am saying is I am not prepared to make
10 the great leap. If you wish to fill in step by step
11 the processes that are required by us to have to fulfill
12 the various functions, whether judge or lawyer, the basis
13 that will enable that to go into the record evidentiary-
14 wise, then I am going to let you get it in, but if you
15 want me to make the great leap and get it in, there being
16 an objection, I am not prepared to do that.

17 What it gets down to is the extent to which
18 you wish to lay sufficient foundation to elicit from
19 this witness who is no doubt knowledgeable that which it
20 is you wish to bring out.

21 There are some rules that govern what we do
22 even in nonjury cases. Your opponent is entitled to re-
23 quire of you, before he finds himself presented with
24 evidence to support your side of the case, that the evi-
25 dence presented is good evidence. He doesn't know what

md:mg

Meisgeier-direct

documents were reviewed by Mr. Meisgeier, he doesn't know when they were reviewed, he doesn't know what these various inputs of information were.

Do you see?

He is entitled to stand up and cross-examine the witness and know what questions to ask. You just have not gotten there yet. So it is a matter essentially of foundation.

MR. ENGLAR: I understand what your Honor is saying, and I appreciate it. However, I would respectfully suggest that Mr. Meisgeier is here to offer opinion testimony based on an exposure that is unique in the country, and certainly I am willing to, if your Honor believes it appropriate, take him through --

THE COURT: Let me interrupt for a moment. If you wish him to offer opinion, it means, in other words, you do not present him as a fact witness.

MR. ENGLAR: That is correct.

THE COURT: If you are presenting him then for his opinion that means to me that you are presenting him as some type of an expert.

MR. ENGLAR: That is correct, your Honor.

THE COURT: If you wish to lay a foundation to precede your making an application for him to be

1 md:mg

2 declared an expert, you are free to do that, and then
3 you must tell me that he is expert as to what so that
4 when I make the finding or the declaration some Court of
5 Appeals panel reviewing what I have done would know what
6 you asked me to declare him an expert in and know what I
7 declared him an expert as.

8 That doesn't seem too much as a way of pro-
9 ceeding. It is just that I am not going to, kangaroo-like,
10 leap and bound oblivious to the method by which we in the
11 judicial process try to proceed.

12 I could do it if we were prepared to try the
13 case again because it would be sent back to me again to
14 fill in between the leaps and the bounds, and I don't
15 want to try this case but once, so you have got your
16 opportunity to lay the basis.

17 Q Mr. Meisgeier, if we may go back to the
18 beginning of your involvement with the coalition, you
19 stated that you were executive director of the association
20 of McDonald's dealers.

21 Can you tell us when you got involved with
22 the McDonald's dealers and how that involvement came
23 about?

24 A The McDonald's Operators Association was
25 formed after a certain chain of circumstances developed

1 md:mg

2 whereby operators across the country met to discuss ir-
3 regularities taking place within the McDonald system.
4 This included real estate, hiked-up real estate prices
5 which were in turn passed on to the consumer, illicit
6 dealings between company personnel and contractors, which
7 again is passed on to the consumer through the franchise
8 agreement, because once a restaurant is built, whatever
9 that restaurant costs, if it is \$1 million or \$500,000,
10 the franchisee's cost for that restaurant is based upon
11 the rent and royalties on an annual percentage rate.

12 THE COURT: Isn't a hamburger going to cost
13 the same in any McDonald's regardless?

14 THE WITNESS: No, sir.

15 THE COURT: It will vary?

16 THE WITNESS: Yes, sir. Currently in Phoenix,
17 Arizona, there is a situation where the hamburgers cost
18 35 cents in one store and 20 cents in another.

19 THE COURT: Go ahead.

20 A The franchisees, upon getting together, found
21 that there were these irregularities existing, and they
22 not only were suffering but the consumer also suffers.

23 In light of these facts, the group got together--

24 Q When was that?

25 A In January 1974. The group got together and

1 md:mg

2 appointed a panel of seven people to talk to Mr. Ray
3 Crock about these irregularities, and Mr. Ray Crock in
4 typical fashion of a large corporation dealing with what
5 he considered a union --

6 Q Who is Mr. Ray Crock?

7 A Mr. Ray Crock is founder and chairman of the
8 board of McDonald's Hamburgers, McDonald Corporation.

9 Q Proceed.

10 A --refused to talk with the group and the group
11 ultimately formed what is now known as McDonald's
12 Operators Association.

13 THE COURT: And you became the executive di-
14 rector of that?

15 THE WITNESS: I became the executive director
16 in April of 1974.

17 Q What have been some of the functions and ac-
18 complishments of the association?

19 A Unfortunately, the accomplishments have not
20 been as widespread as those of Midas because we have a
21 fear of intimidation and coercion that exists with the
22 McDonald's operators across the country. Our membership
23 is growing slowly due to this but we do publish a news-
24 letter, we do openly criticize irregularities, what we
25 consider to be irregularities in the company's processes

1 md:mq

2 of dealing with franchisees in establishing business
3 criteria.

4 Q When you say "we do," who are you referring
5 to?

6 A The McDonald Operators Association, and this
7 we submit to every McDonald operator across the entire
8 United States.

9 Q What is your function in that regard?

10 A Actually, I wear several hats. I am the
11 editor and publisher and major writer of the newsletter,
12 gatherer of facts, coordinator of efforts as far as when
13 an operator calls me with a particular problem directing
14 him to somebody who has the legal prowess or acumen to
15 represent him capably from our library that we maintain
16 of previous cases that have come up of like nature.

17 I arrange for conventions, seminars. I am also
18 their alternate delegate to the coalition.

19 Q I believe you also mentioned that you had
20 some capacity with the Association of Dunkin' Donuts
21 Franchisees, is that correct?

22 A Yes.

23 Q What is that capacity?

24 A The capacity is as executive director but that
25 is a relatively new situation effective as of January 1st

1 md:mg

2 of this year.

3 Q What is the background of the formation, lead-
4 ing to the formation of the Dunkin' Donuts Franchisees
5 Association?

6 A It was a similar situation to the McDonald's
7 situation in that the franchisees realized that for
8 their own best interests due to the lack of their ability
9 as individuals to resist the franchisor's demands as to
10 who they buy the supplies from, what prices they pay,
11 to change from pink tile to white tile, which they would
12 have had to have done without an association, which
13 ultimately reflects in the price.

14 Q You were approached by the franchisees of
15 Dunkin' Donuts?

16 A Yes. At that time I was solely an employee of
17 McDonald's Operators Association, due to the fact that
18 franchise associations are relatively new and all of
19 them go through the same growing pains and a lot of them
20 get cold feet in the face of the big franchisor.

21 In franchisee associations, where most of the
22 relationships are adversarial in nature, unfortunately,
23 I was asked if I could operate in a dual and then subse-
24 quently in a triple capacity as executive director of
25 these various associations.

1 md:mg

2 Q I believe you mentioned that the original
3 membership of the coalition consisted of six franchisee
4 associations?

5 A Yes.

6 Q Which associations were those?

7 A Those were Dunkin' Donuts, McDonald's Operators,
8 Baskin-Robbins, and W. Richter, National Beer Wholesalers
9 Association, American Association of Independent
10 Newspaper Dealers.

11 Q Can you tell us who the remaining members are?

12 A If I may refer to my list?

13 Q Certainly.

14 A Pizza Independent Franchisee Association, Denny's,
15 Ford Dealers Alliance, Dairy Queen, Council of Hertz
16 Licensees, McDonald's Operators I mentioned already,
17 Shakey's Pizza, News Distributors, National Beer Whole-
18 salers, Kentucky Fried Chicken, Independent Dealers
19 Committee Dedicated to Action -- that's an auto group
20 here on the East Coast -- Wine and Spirits Wholesalers
21 of America, National A & W Franchisee Association, Denny's,
22 Recreation and Vehicle Dealers of America, and Amoco
23 Transmissions are pending admission to the group.

24 Q In your capacity as executive director of the
25 coalition you have testified already that you engage in

1 md:mq

2 discussions and you have attended seminars and have
3 become familiar with some franchising agreements.

4 Can you tell us, can you relate for us, please,
5 the number of seminars you have attended and what has
6 occurred at those seminars?

7 A The seminars usually rally around the various
8 pieces of legislation that are pending either at the
9 state level or the federal level. That seems to be
10 the main rallying point because the franchisees have
11 been beaten down so many times in court, the franchisors
12 have the attitude of "Sue us, we have more money, we have
13 more time."

14 Consequently, if they do enter into litigation,
15 five years and \$500,000 later the franchisee might have
16 saved his business if he has that amount of wherewithal --
17 the only door left open to us was to introduce legislation
18 at the federal level and then subsequent to that at the
19 state level and we have that pending in 14 states and at
20 the federal level currently.

21 I also played a part in drafting many of the
22 bills that were introduced across the United States and
23 in Washington built around the abuses that franchisees
24 were suffering. A lot of it has to do with trying to
25 gain the freedom for franchisee associations to make more

1 md:mq

2 equitable arrangements for purchasing of products, base
3 products, either for resale or for the making of a ham-
4 burger, etc.

5 If I might address myself to the public bene-
6 fit aspect of some of the groups involved, I know that
7 for a fact, and I read the proceedings of how it happened,
8 of the Ford Dealers Alliance, with eight people in it
9 on the East Coast who started the Ford Dealers Alliance
10 and struggled with it over a period of seven or eight
11 years and are now to the point where they have 25% of
12 the Ford dealers as members, but they are responsible for
13 45% of the Ford Motor Company's sales where they had
14 instituted the procedures for manufacture and distribution
15 of replacement parts which were prior to that time only
16 available through Ford Motor Company at a great cost
17 saving to the consumer.

18 I know of purchasing co-ops within the Baskin-
19 Robbins and Dairy Queen system, and the Shakey's system,
20 whereby the franchisee associations, by pooling their
21 efforts, were able to come up with supplies necessary to
22 run these various businesses at a great cost reduction.

23 A direct example, and it is a matter of court
24 history in the State of Wisconsin, was the Shakey's
25 people were being asked to pay for what was considered

1 md:mq

2 a secret seasoning package at \$24 a pound to the parent
3 company and the franchisee association, through analyzing
4 the process of the formulation of the seasoning package,
5 were able to come up with the same product at \$3 a pound.

6 This is a direct benefit to the consumer in
7 that regard.

8 There are instances within Baskin-Robbins,
9 where there is a current class action pending, where
10 antitrust laws are being questioned in regard to price-
11 fixing, and unfair, what we consider unfair intimidation
12 of the company to replace units in a restaurant, in an
13 ice cream shop that is in perfectly good shape merely
14 because they changed the color scheme.

15 Without the franchisee association being there
16 to do this, no franchisee, it is questionable whether
17 any franchisee could go to the expense and the burden
18 of fighting the parent company.

19 MR. SALERNO: I am sorry, I must object to
20 this extended narrative. All we are getting are specific
21 instances about how a franchisee association in entirely
22 different industries engage in activities that may ulti-
23 mately redound to the public benefit to the extent that
24 they enable the dealer to charge a lower price to the
25 public.

1 md:mq

2 We already had specific testimony from
3 Mr. Gordon as to how that might occur in connection with
4 the plaintiff in this action, which I think is all that
5 is relevant.

6 So far we have had no evidence of any knowledge
7 of Mr. Meisgeier that Mr. Gordon did not have. Mr.
8 Meisgeier's experience in fact is just like Mr. Gordon's.
9 He has been an executive director of two franchisee
10 associations. Mr. Gordon has been that longer.
11 Mr. Meisgeier wasn't even director of one of these as-
12 sociations, in McDonald's, until 1974, which is outside
13 the relevant period.

14 Aside from that all he is testifying to is
15 what we already know, which I said before, and that is
16 that franchisees do need franchisee associations. I
17 don't think there is any question about that. That's
18 why I think all this testimony we have heard so far, and
19 presumably whatever testimony he is laying a foundation
20 for, even though I don't see what that can be, is repeti-
21 tive and irrelevant to this case.

22 He is testifying about companies that don't
23 even deal in mufflers. .

24 THE COURT: Mr. Salerno says it is not in
25 dispute on his part that franchisees require franchisee

1 md:mg

2 organizations, for self-protection, I suppose, or what-
3 ever.

4 MR. SALE Sure.

5 MR. ENGLAR: If Mr. Salerno will take the
6 next step which we believe is logical and concede that
7 the presence of the franchisee association redounds to
8 the public benefit, then I daresay we can stop this trial
9 right now and rest on the record as it is.

10 MR. SALERNO: No. The only concession I will
11 make is whatever this Court can find from the testimony
12 that is a specific benefit that results from the activity.
13 I think the Court can find that the negotiation of a
14 lower price for something redounds to the benefit of a
15 consumer of mufflers. I don't know if that is a broad-
16 based public benefit. In any event, we contend that that
17 is not the type of public benefit sufficient to make one
18 a business league within the meaning of the term as has
19 been used by the Second Circuit in Produce Exchange.

20 I think we must focus again on the language
21 of that case, particularly toward the very end of page
22 144. I think the same inferences about public benefit
23 where a service was provided to clearinghouse members in
24 that case, that could have an indirect benefit to the
25 public, to the customers at least of the brokers involved

1 md:mg

2 in that case; by lowering prices.

3 The fact remains the Court in that case found
4 the petitioner's activities are solely for the direct
5 benefit of its so-called clearing members. Nothing is
6 done to advance the interests of the community or to
7 improve the standards or conditions of a particular
8 trade as in the case of Chambers of Commerce Real Estate
9 Boards and Boards of Trade.

10 THE COURT: All right.

11 MR.SALERNO: The benefit to the public is at
12 best indirect. It is the kind of benefit that results
13 from efficiency at best, or from negotiation of a lower
14 price. It has never been held to be sufficient to make
15 one a business league.

16 MR. ENGLAR: It may be so that it has never
17 been held sufficient except in the Pepsi-Cola Distributors
18 case to constitute one a business league.

19 THE COURT: You want me to take a Seventh Circuit
20 case and say that is the law that is applicable here when
21 the government has cited that a Second Circuit case,
22 albeit a 1933, 1934 case, which holds otherwise?

23 There is a discipline that is imposed upon a
24 District Judge, and that discipline very simply is that a
25 District Judge is not free to do his own thing. The

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2 whole system is predicated upon a discipline imposed
3 upon District Judges following the law of the circuit,
4 the circuit judges following the law of the United States
5 Supreme Court. I am not here to just do my own thing be-
6 cause I may or may not disagree with that earlier case.

7 If that circuit decision is going to be
8 changed or modified you are going to have to do it at
9 the circuit level. They may be prepared, indeed, to
10 move to the Seventh Circuit's viewpoint. But I am not
11 a circuit court judge.

12 MR. ENGLAR: I am more than aware of the non-
13 binding effect, the nonprecedential effect of the Pepsi-
14 Cola Distributors case except insofar as the logic may
15 be persuasive to this circuit.

16 The reason for having Mr. Meisgeier here is pre-
17 cisely because the Produce Exchange case does exist,
18 because in this circuit apparently your Honor has held
19 in the summary judgment decision that the issue of
20 public interest is one to which we should address our-
21 selves, and --

22 THE COURT: So you are offering Mr. Meisgeier.

23 MR. ENGLAR: We are offering him as an expert
24 witness, or we will proffer him as an expert witness to
25 testify specifically, to give his opinion regarding the

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2 public interest to be served by having franchisee as-
3 sociations.

4 THE COURT: ~~Just a moment.~~

5 Read that back.

6 (Record read)

7 MR. ENGLAR: I would like to point out some-
8 thing that perhaps has been overlooked with regard to
9 the Produce Exchange case, and that is that regardless
10 of the Produce Exchange case, which did address itself
11 to a definition of business league in connection with
12 an organization performing a securities transaction
13 clearing service for its members, to our knowledge, and
14 neither we nor the government has seemed to find any
15 other case in point, dealing specifically in this
16 circuit or any other circuit, apart from the Pepsi-Cola
17 case, dealing specifically with the entitlement of a
18 franchisee association, which is a different animal
19 than the animal that we dealt with in the Produce Exchange
20 case or any of the other cases cited in the government's
21 brief or our own brief.

22 To the extent that is so, it is respectfully
23 submitted this is a case of first impression in this
24 circuit, and that business league, the generic discussion
25 or the discussion of the generic meaning of business

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1 league as applied to the Produce Exchange case is not
2 necessarily binding on a different factual situation
3 than we have here
4

5 THE COURT: Suppose the group involved here
6 were health providers who had organized and seek to
7 avail themselves of the status as a business league,
8 wouldn't the principle be the thing that would govern?
9 Wouldn't the principle be that which you would look for?
10 It doesn't matter that the organization is of a particular
11 kind. They could be an association of persons rendering
12 health-related services that represents LPN's who work
13 out of these registries, for example. Maybe they are
14 being taken advantage of, and they form an organization.

15 Anyhow, let's move along.

16 You wish to have this witness declared an
17 expert regarding the public interest to be served by
18 the existence of franchisee associations, correct?

19 MR. ENGLAR: I do, your Honor.

20 THE COURT: Do you want to be heard on the
21 voir dire, Mr. Salerno?

22 MR. SALERNO: Not on the voir dire except
23 so far we haven't heard any evidence this witness has
24 any knowledge of public benefit. He merely knows what
25 he does both as an executive director for the McDonald's

1 md:mg

2 Franchisee Association and the Dunkin' Donuts. He has
3 knowledge of what he does in the National Coalition of
4 which he is also executive director. By extension we
5 could presume he knows what the needs of franchisees and
6 franchisee associations are, and we have heard lots of
7 testimony that would establish him as qualified to tes-
8 tify from personal experience of the kind of problems
9 franchisees have.

10 So far we haven't heard anything that tells
11 us that he has any expertise to offer opinions as opposed
12 to pure facts about any public benefit.

13 THE COURT: The objection is sustained and the
14 application is denied.

15 MR. ENGLAR: May I have a moment, your Honor?

16 THE COURT: Yes, sir.

17 (Pause)

18 MR. ENGLAR: Your Honor, in light of your
19 ruling I will ask Mr. Meisgeier to step down unless
20 counsel for the government has any questions.

21 THE COURT: Have you any questions?

22 MR. ENGLAR: However, in doing so, I would
23 respectfully take exception to your Honor's decision
24 not to qualify him as an expert witness qualified to
25 gather data and give an opinion regarding the public

1 md:mq

2 interest to be served by a franchisee association, and
3 in doing so, would note that I daresay the government
4 would take absolutely no exception to the exemption
5 which we seek if the National Muffler Dealers Association
6 was opened to all muffler dealers wherever located.

7 THE COURT: Whether that is true or not, I
8 don't know. I don't have to deal with a hypothetical
9 situation. I only have to deal with the situation facing
10 me here and now.

11 I am called upon to make a ruling based on
12 what is before me now, and I have ruled, and you have
13 your exception.

14 MR. ENGLAR: I have no further questions.

15 THE COURT: Any questions of this witness?

16 MR. SALERNO: None at this time, reserving
17 my right to examine him if he is recalled.

18 THE COURT: Call your next witness.

19 (Witness excused)

20 MR. ENGLAR: Mr. Robert Kaden.

21 R O B E R T J. K A D E N, called as a
22 witness by the plaintiff, being first duly sworn,
23 testified as follows:

24 MR. SALERNO: I would like to state at this time
25 Mr. Stauffer will be handling the cross-examination of

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Kaden-direct

2 this witness and therefore any objections that may be
3 necessary during the course of his testimony.

4 THE COURT: All right.

5 DIRECT EXAMINATION

6 BY MR. ENGLAR:

7 Q Mr. Kaden, what is your position and title,
8 please?

9 A I am president of Goldring & Company, Market
10 Research, in Chicago.

11 Q And Goldring & Company is in what business?

12 A We do market research studies.

13 Q How long have you been with Goldring & Company?

14 A I have been associated with Goldring & Company
15 first as executive vice president and then as president
16 for just four years, for the past four years.

17 Q Prior to that did you have any experience in
18 market research?

19 A I spent the previous eleven years in a market
20 research capacity for various large advertising agencies
21 in Chicago.

22 Q As a market researcher, can you outline for
23 us briefly what your function is?

24 A Our function is to gather and interpret and
25 analyze and to make recommendations about data relating

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2 to more successfully marketing goods and services for
3 our clients. Goldring & Company in the last four
4 years has conducted just under 300 market research
5 studies of all kinds and types of clients such as
6 Sears, Kraft's, Del Monte Corporation, Hallmark
7 Corporation, and Midas, to help them gather data to make
8 better and more sound business decisions.

9 Q After gathering data relating to market
10 conditions, etc., what is generally done with that data?

11 A Depending on the specifications of the study
12 the client will either be given the raw data for his
13 own interpretation or he will hire us, our company, to
14 interpret the data.

15 I would say 60 to 70% of the studies we do
16 involve interpretation or expert opinion on our part as
17 to what the data means and how it might be used.

18 Q What is the type of conclusion - - what are
19 the type of conclusions you might be called upon to draw
20 from this data?

21 A We would counsel clients as to whether or not
22 to market a new product, we would counsel clients on how
23 to better position current products so as to achieve
24 a stronger position in the marketplace. We would
25 counsel clients as to what advertising messages are

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2 most appropriate.

3 Anything that would give a client a competi-
4 tive edge.

5 Q Among the conclusions that you might draw,
6 or the matters into which you might inquire, does the
7 company get involved with share-of-the-market studies?

8 A Yes, we do.

9 Q What types of conclusions are you asked to
10 draw from those?

11 A Often we will be in a position of interpreting
12 what share-of-market data means. If a client has a
13 particular share, is that a strong share or a weak share,
14 is it something that they can improve upon by doing cer-
15 tain things, is it something that is weakening as a re-
16 sult of what competitors are doing?

17 Share information is highly interpretive dealing
18 with the particular market and competitive influences
19 within that market. There is simply no way of comparing
20 one industry's share figures with another industry's
21 share figures. A share in one industry of 5% could be
22 a dominant share. A share in another industry of 40%
23 could be a small share.

24 Q You say it is difficult to compare industries
25 and share of the market. What are some of the variables

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2 you consider in making these determinations?

3 A You look at the number of competitors and
4 whether those competitors are proprietary companies;
5 that is, do they have particular brands that compete.

6 For example, in the toothpaste business there
7 are many consumer brands that are known.

8 In the muffler business there aren't a lot of
9 consumer brands that are known.

10 There are other businesses that are involved
11 in replacing and selling mufflers, but the work that
12 we have done indicates that there are very little brand
13 names that are well-known in the muffler business as would
14 be known in the toothpaste business.

15 Q I believe you mentioned that Goldring & Company
16 has conducted several hundred studies.

17 A Yes.

18 Q Could you elucidate for us?

19 A Goldring & Company in the past --

20 THE COURT: Do you want him declared as an
21 expert?

22 MR. ENGLAR: Yes.

23 THE COURT: Make your request.

24 MR. ENGLAR: I submit his background and
25 experience qualifies him as an expert in the field of

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2 market research and share-of-market studies, and I ask
3 the Court to so declare him.

4 MR. STAUFFER: We do not object to his being
5 qualified as an expert in market research. We do object,
6 however, to his being qualified as an expert in share-of-
7 market studies in that it has not been adequately de-
8 fined or that his experience in that particular area is
9 sufficient to enable him to be an expert on the matters
10 in this case.

11 THE COURT: So first then there being no op-
12 position, Mr. Kaden is declared an expert witness in
13 market research.

14 Now, develop your foundation on market studies
15 and then we will see.

16 MR. ENGLAR: That is just where I was going,
17 your Honor.

18 Q Mr. Kaden, I asked a question with regard to
19 the number of studies that Goldring & Company has con-
20 ducted and you were in the middle of your answer, I
21 believe.

22 A We have conducted 300 studies in the last
23 four years. Virtually all of our studies in some way
24 or another deal with the position of a brand vis-a-vis
25 competition. If a brand is weak in the marketplace and

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Kaden - direct

2 its share is low the client may be asking such questions
3 as how do you attack the leader whose market share may
4 be high. If a client's position is one of strength
5 where his brand share is high he will ask questions as
6 to how to maintain that market share and how to strengthen
7 it.

8 Brand share plays an important role, or brand
9 position, in the marketplace, in virtually every study
10 that we do.

11 Q And the variables you discussed in determining
12 what is market share, what do you mean by market share?
13 When we talk about a company's share of the market, what
14 is meant precisely?

15 A Every company has their own interpretation.
16 To some companies a market share is the number of people
17 who have purchased the product that they sell within a
18 given period of time.

19 To other companies it is the number of units
20 that had been purchased in a given period of time.

21 In the case of Midas it would be -- share was
22 interpreted as --

23 THE COURT: I think we are really interested in --
24 his qualifications to be declared an expert here with
25 reference to share-of-market studies.

1 md:mg

2 Why don't you address expertise, and then we
3 will get to the point.

4 Q Mr. Kaden, with regard to these 300 or so
5 studies that have been conducted by Goldring, what is
6 your involvement in those studies?

7 A As president of Goldring every study crosses
8 my desk in one way or the other, and for some studies
9 I write the analysis, I would say for two-thirds of the
10 studies I write the analysis, for others I review the
11 analysis. It goes out under our company name with my
12 blessing.

13 Q Prior to your association with Goldring &
14 Company, were you involved with studies which involved
15 share of the market?

16 A Continuously.

17 Q In what capacity?

18 A As a research analyst or a research manager for
19 large advertising agencies working on such accounts as
20 Hamm's Beer, Sears, Sara Lee --

21 THE COURT: Could you tell us something about
22 your preparation to act as a research analyst?

23 THE WITNESS: My preparation is -- my degree
24 is in communications, and in the market research industry
25 I am not sure that anybody grants a degree in market

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research. Most of the experts --

THE COURT: For example, when you use the word "research," for example, if I have a medical person on the stand who says he conducts research into some form of cancer, I'll have a whole slew of credentials offered and experience and preparation that is first academic and then experiential.

Could you give me some equivalents that prepared you in connection with doing research with respect to share of markets?

THE WITNESS: My experience is empirical, it is experiential. I dealt with six or seven hundred market research studies in my career. I have interpreted and presented data of a share nature hundreds of times. I counsel clients as to what their share is.

THE COURT: Can you give us some generalized idea of-- I guess what I am after is different people mean different things when they use the expression "research." Do you accumulate data and then apply formulae to the data? What is involved? Why couldn't I go out on the streets of New York and become a researcher of the type you have mentioned? What is needed? What do you do when you say you do research of this kind?

THE WITNESS: In our industry anybody can go

1 out on the street and claim themselves a market researcher
2 insofar as people will listen to him and do what he says.

3 THE COURT: What makes you different from that
4 person?

5 THE WITNESS: I have 15 years of experience
6 and 90% of our clients come back to us. We have made
7 recommendations that have allowed clients to increase
8 their share of the market as a result of recommendations
9 we have made, and in their opinion -- I get my expertise
10 from them. There are companies whose prime purpose it
11 is to gather data and present the data. They do nothing
12 interpretively about the data. They gather it, present
13 it, and allow the client to make his own judgment.

14 Ours is not such a company. We design research
15 on an ad hoc custom-design basis and as such our clients
16 look to us for interpretation of that data.

17 THE COURT: Any objection to his qualifica-
18 tions on share-of-market studies?

19 MR. STAUFFER: We do. The primary objection
20 is we don't see the relevance of that to the legal
21 question before the Court.

22 THE COURT: I overrule the objection as to
23 relevance.

24 Is there any further objection?
25

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2 MR. STAUFFER: Yes. By his very own testi-
3 mony he has no special training, no formal training,
4 as to any of this. I haven't heard any testimony con-
5 cerning training in economics, in statistics, in any
6 of the matters that one would normally assume.

7 THE COURT: That is what I have been looking
8 for. I don't suggest it has to be formal, but I suggest
9 it has to exist. So far I haven't heard it, and it is
10 your job, so you pick it up.

11 MR. ENGLAR: Your Honor seems to have pre-
12 empted me along the way.

13 Q What is your schooling background?

14 A My degree is in communications. I have taught
15 market research and advertising. I have done special
16 courses in statistics and in the interpretation of
17 statistical data. I am qualified for coding question-
18 naires and for developing market research computer
19 programs to spit out data so it can be interpreted.

20 Many of the courses that I took in college
21 were in business statistics or in statistics. I taught
22 clients on how to use statistical data.

23 Q What is the nature of the data which you
24 gather in making determinations and analyses of market
25 share, Mr. Kaden?

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2 A Please repeat your question.

3 Q What is the nature of the data which you
4 gather in making determinations and analyses of market
5 share?

6 A The nature of the data varies depending upon
7 the technique and the budget the client has. We collect
8 data through telephone interviews, through mail surveys,
9 through intercepting people in shopping centers, through
10 door-to-door surveys. It depends on the business prob-
11 lem at hand and the sampling procedure, the validity
12 with which a client wants to use the data.

13 Q In making these surveys, Mr. Kaden, how are
14 the questions, the nature of the questions that are
15 asked, to conduct your survey, how are they put together?
16 Who puts them together and in what manner?

17 A It is a process by which objectives are first
18 developed as to what the client is seeking, and in most
19 situations the client will come to us for interpreting
20 those objectives into questions and writing the questions
21 themselves. The questions themselves are presented to
22 the client and worked on and pretested so that everyone
23 is confident that they are being phrased in a way that
24 will produce the information that is desired.

25 It is a process that is not the same every time.

1 md:mg

2 Some clients absolutely do not want to see a question-
3 naire that we have developed because they are totally
4 confident of our ability to write questions to elicit un-
5 biased answers.

6 Other clients want to be involved in the
7 process.

8 Q Have you yourself been involved in the wording
9 of questionnaire surveys and the questions that are
10 submitted upon these surveys?

11 A Yes.

12 MR. ENGLAR: Your Honor, I would renew my re-
13 quest that Mr. Kaden, based upon his educational back-
14 ground, the teaching background to which he has testified,
15 and the tremendous volume of experience in the market
16 research and share-of-market fields, be declared quali-
17 fied as an expert to testify in the field of share of
18 the market.

19 THE COURT: Decision reserved.

20 Let me hear you develop your questions in
21 connection with this matter.

22 Q Mr. Kaden --

23 MR. STAUFFER: If your Honor please, it might
24 help in developing the record if we are able to conduct
25 a voir dire at this time before you go on to the

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2 substantive testimony.

3 THE COURT: That might be helpful.

4 Go ahead.

5 VOIR DIRE EXAMINATION

6 BY MR. STAUFFER:

7 Q You said you had a degree in communication,
8 Mr. Kaden. Where did you receive that degree?

9 A Columbia College in Chicago.

10 Q On what date?

11 A I don't remember the exact date. It was 1963.
12 It was the summer of 1963.

13 Q What was the specific degree that was conferred?

14 A BA, Communications.

15 Q Could you describe to me the course of studies
16 that was required for the conferring of that degree?

17 A Yes. I took a course in journalism, in adver-
18 tising, in television and radio production, in news-
19 writing, in advertising, and in marketing.

20 Q Mr. Kaden, have you done any formal course work
21 beyond the degree requirements for your BA in communica-
22 tions?

23 A Toward more advanced degrees?

24 Q Yes.

25 A Not toward more advanced degrees.

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2 Q What sort of formal course work have you had?

3 A I have been involved with American Management
4 Association --

5 Q Excuse me, I am going to have to ask you to
6 be more specific as to dates.

7 A I took a course in advanced market research
8 studies with the American Management Association in
9 1969.

10 Q Excuse me, and what was that course?

11 A The title of the course was, I believe, Advanced
12 Market Research Studies.

13 Q What was the subject matter of the course, to
14 the best of your recollection?

15 A The use of market research sampling techniques,
16 the use of -- the correct use of questionnaires, how to
17 write questionnaires, how to phrase questionnaires,
18 the correct interpretation of statistical data.

19 Q Go ahead. Is there more beyond that?

20 A Other courses that I have taken have been with
21 the American Statistical Association. I have taken
22 seminars in regression analysis, which is a market
23 research technique, in multivariant analysis, which
24 is a statistical technique for interpreting market re-
25 search data. That would be it.

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2 Q Mr. Kaden, have you ever made any studies of
3 oligarchy or monopoly situations in various industries?

4 A I have never had a question that has been
5 posed to me in those terms, no.

6 Q In the course of your market share research,
7 if I may pose a hypothetical involving just an industry
8 called X with a specific competitor who has hired you,
9 as a part of your research studies do you analyze finan-
10 cial and cost and profit data for all of the members of
11 that given industry?

12 A No.

13 Q Is it fair to say that the bulk of your
14 determinations and conclusions are based upon question-
15 naire surveys?

16 A Yes, it would be.

17 Q Do I understand you to say then that your
18 conclusions are based upon internally-generated data
19 based upon the questionnaires that you pose?

20 A The data is not internally generated. The
21 data is generated in the marketplace.

22 Q The raw data that you use in reaching your
23 conclusions are the responses to questionnaires?

24 A Yes, that is correct.

25 Q Do the questionnaires cover subjects concerning

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2 profits of competitors in industries?

3 A They have nothing to do with profits.

4 Q Do they cover the costs of competitors in
5 industries?

6 A I don't know what you mean. What do you mean?

7 Q We are talking about a hypothetical competitor
8 in an industry. Do you research that competitor or
9 his other competitors concerning relative costs for their
10 product lines?

11 A In other words, are you asking me if somebody
12 buys a competitor X product how much they would pay for
13 it?

14 Q No, I am talking about the costs of producing.

15 A No, I don't deal with that.

16 THE COURT: How about gross sales?

17 THE WITNESS: We will ask questions relating
18 to have you purchased Brand X, Y, Z toothpaste, how many
19 times have you purchased it.

20 THE COURT: These are questions put to con-
21 sumers?

22 THE WITNESS: Yes. That is correct.

23 "How much have you paid for that product?"

24 MR. STAUFFER: Your Honor, at this point I
25 would renew my objection to his qualifications as an

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1 expert. So far as the voir dire reveals, if anything
2 his expertise is in divining the public's conception of
3 a competitor's role in an industry. It is not even to
4 showing an economic basis for that share of a market which
5 is presumably the area in which he is to be qualified
6 as an expert.
7

8 MR. ENGLAR: Your Honor, I must admit I am
9 somewhat at a loss here. Mr. Kaden, as he has testified,
10 is with a company that is a recognized market research
11 company for which multimillion dollar companies-- to which
12 multimillion dollar companies come to have data gathered
13 and assessed, such data to relate to share of market--

14 The marketplace is perhaps the best evidence
15 of Goldring & Company's and Mr. Kaden's expertise in the
16 field of market research and share-of-market studies.

17 Perhaps the questions that were asked by the
18 Assistant U. S. Attorney did not precisely go to the
19 nature of the data that Goldring & Company utilized. I
20 think the questions were somewhat limited and hypothetical,
21 and if Mr. Kaden is permitted perhaps, as your Honor sug-
22 gested, we could go on and we could discuss the manner
23 in which-- we can be more specific about the nature and
24 the manner in which share of market is ascertained.

25 I presume that one of the questions that is

If Mr. Kaden is given his head a little, I am certain he can clarify for the Court the manner in which he comes to these conclusions as to share of market.

I do not declare him to be an expert witness with respect to share-of-market studies based upon the answers which have been elicited by the Assistant United States Attorney on the voir dire.

MR. ENGLAR: Will your Honor permit further foundation to be laid?

THE COURT: It depends. I am not going to spend all day on the foundation area. If you wish to take a few more minutes, go ahead. Let's see what you have.

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2 BY MR. ENGLAR:

3 Q Since we have been talking about hypothetical
4 situations, Mr. Kaden, let us assume that Company X comes
5 to you, to Goldring & Company, and asks for a determination
6 as to their share of the toothpaste market, let us say,
7 and the manner in which they might be able to improve that
8 share.

9 I have just come to you and asked you for that.
10 Could you please outline for the Court what you would do
11 at that point?

12 THE COURT: Take the first part first.

13 THE WITNESS: Which is what?

14 THE COURT: They want to know how much of the
15 market is my company presently getting.

16 THE WITNESS: I would ask them how precise
17 they want to be with their estimates.

18 THE COURT: Once they tell you, then what
19 would you do?

20 THE WITNESS: Do you want to look at it on a
21 national, regional, state, city basis?

22 THE COURT: They tell you national.

23 THE WITNESS: Then what I would do is recommend
24 a sample that would allow me to sample between 1000 and
25 1500, to allow me to repeat that survey with the sample

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drawn in identical ways among different people so the data could be produced within 2 to 3% of the first time it was gathered.

THE COURT: What you are saying is you go to consumers and you ask them certain carefully selected questions.

Isn't that so?

THE WITNESS: Correct.

THE COURT: You do not go to published data compilations which the firm files somewhere, is that right?

THE WITNESS: That is correct. In my experience asking consumers what products they use is highly indicative of what will happen when you go directly to the store and monitor what is moved out of the store, without even asking questions. Taking a survey where I would ask a consumer what brand of toothpaste she buys --

THE COURT: I think we have heard enough.

Yes to market research. No to share-of-the-market studies.

We will interrupt for lunch and resume at 2:30.

(Luncheon recess)

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AFTERNOON SESSION

2:30 p.m.

THE COURT: Please continue.

MR. ENGLAR: Mr. Kaden, please.

R O B E R T J. K A D E N, resumed:

DIRECT EXAMINATION (resumed)

BY MR. ENGLAR:

MR. ENGLAR: Your Honor, at the risk of beating a dead horse, over lunch Mr. Kaden and I discussed the events of this morning in court and myself not being an expert in market research I was advised that to term somebody an expert in market research and not term him an expert in share-of-market analysis is virtually a contradiction of terms.

I gathered from your Honor's questions this morning that one of the key factors in denying the latter declaration of expertise was the apparent belief that Mr. Kaden's data in assessing market share was the utilization of consumer questionnaires or of data received from consumers rather than different types of data.

If that is so, the Court, I am advised, is under a misapprehension as to the nature of the data and I would request Mr. Kaden be allowed to testify as to the nature of the data that is in fact used in addition to consumer

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questionnaires.

THE COURT: I intend to permit you to elicit what you wish within the framework of the declaration of Mr. Kaden as an expert in market research.

If it happens to bear on matters relating to share of the market, that's one thing. I have simply declined to declare him an expert to testify on share of market as such.

You may offer evidence via market research which bears on the matter and that's up to you.

MR. ENGLAR: Thank you, your Honor.

MR. STAUFFER: If I might, I would simply wish to interpose an objection in that the definition of a market researcher, whatever it is, would appear from the record, and the plaintiff very specifically distinguished between market research and share-of-the market studies when he sought to have this witness classified as an expert.

THE COURT: I think essentially what you are objecting to is the question of the weight which is attached to that which is offered. Counselor can offer the evidence that he is able to elicit and it may be that it has some relevance to the issue of share of market, but it may not have a great deal of weight in view of the

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nature of the research.

It may well be that a carefully conducted survey of consumers can produce data which bears on the extent of share of a market, but I am not so sure that it is entitled to the degree of weight that is normally attached to the kind of evidence that you tend to look for when that is an issue in this court. You tend to get that kind of information from people with very different expert qualifications, and it tends to be based upon assessments of much different data than consumer use or consumer responses to survey research.

I am not going to exclude it. I am going to take it. The issue will be the weight which is attached to it.

I have sustained the objection as far as your position vis-a-vis declaration of expertness.

MR. STAUFFER: If I understand your Honor then he will be permitted to testify as to what he actually did, and obviously insofar as that doesn't bear upon any expertise we won't have any objection.

THE COURT: Go ahead.

Mr. Kaden, please understand that there is no denigration of you or your capacities intended by the Court. It is simply that these represent legal matters,

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2 evidentiary matters more particularly, which are required
3 by our rules, and the ruling is intended to be made in
4 conformity with certain standards which I understand
5 flow from these rules.

6 Go ahead.

7 Q Mr. Kaden, did there come a time when you in
8 your capacity with Goldring & Company was asked to conduct
9 a study for Midas International, Inc. and the plaintiff
10 association?

11 A Yes, that is correct.

12 Q When was that?

13 A The study, I believe, was commissioned in--
14 I would have to go back to my records but I believe it
15 was March or April of 1975.

16 Q 1975, is that correct?

17 A Yes, that is correct.

18 Q What was the purpose of that study to be?

19 A The purpose was manifold.

20 Q You may, incidentally, refer to Defendant's
21 Exhibit E, which is, your Honor, the market study prepared
22 by Goldring & Company.

23 A The purpose was manifold, primarily to determine
24 the position of Midas in the market on a national scale.
25 In order to determine their position we would collect such

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2 information as consumer awareness, attitudes toward Midas,
3 why people come there, why they don't come there, what
4 would prevent people who had come there from returning,
5 why people would go to a competitor instead of Midas, and
6 what Midas' overall position was vis-a-vis competition,
7 whoever their competition was deemed to be by the survey.

8 Q Could you please briefly, with the understand-
9 ing that the exhibit and the manner in which you conducted
10 the survey is contained in the exhibit, outline for us
11 the manner in which the survey was conducted?

12 A The survey was conducted by telephone with
13 men who were responsible for the maintenance of their
14 automobile. It was conducted among a sample of I be-
15 lieve -- I believe the total sample was 1093, of which
16 597 were men who had replaced mufflers on their automobiles
17 in the past 12 months. And the remainder of the sample
18 were those who had not replaced mufflers on their cars
19 within the previous 12 months.

20 It was done by telephone out of a national
21 central Watts line facility in New Jersey. The interviews
22 took place mostly in the evenings and weekends when men
23 could be reached.

24 MR. STAUFFER: Your Honor, if I might, at this
25 point I wish to interpose an objection to any testimony

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2 drawn from this market research survey. By his testimony
3 so far he has testified that the survey was commissioned
4 in March of 1975, I believe, and that it covered at most
5 a year prior to whatever date the telephoning was done.
6 The earliest that would take him back to is March of 1974.
7 In fact, on the face of the survey it is the telephoning
8 was done in June of 1975. The earlier point at which
9 any evidence at all concerning consumer attitude could
10 be taken would be June of 1974, beyond the tax period by
11 approximately eight months, and that is the very end of
12 the tax period, and this case covers a period of three
13 years.

14 THE COURT: Your point is well-taken.

15 Nevertheless, I will overrule the objection.

16 Q To whom were the phone calls directed? You
17 have told us to whom you spoke, but how did you ascertain
18 who the phone calls would be made to?

19 A A series of markets representing what Midas
20 felt to account for a major proportion of their business
21 were selected. The markets were selected to represent
22 both good Midas markets, excellent Midas markets, fair,
23 and poor Midas markets, so as to allow for a national
24 cross-representation of the United States where Midas does
25 business.

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The number of interviews and the number of markets were chosen to be in line with the budget that was given us for this study, and it was felt to be -- these 18 or so markets where it was covered were felt to be representative of a major portion of the United States where Midas conducts their business.

THE COURT: Who did you contract with, sir?

THE WITNESS: It was contracted through Midas International, and our invoices were sent to the corporation. We understood that the study, though, was being funded, 50% of it was being funded by the dealers association and 50% was being funded by the corporation.

We did have a prior meeting with members of the dealers association and the corporation to help plan the study. The invoices, though, were sent to the corporation.

Q Are you aware as to where Midas got the information which it supplied you relative to which of its markets were good markets, poor markets, fair markets, as you earlier stated?

A No. I was not aware. This was information that we asked them where they felt would be the wisest places to take the sampling, and they gave us a list of markets.

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2 Q After the phone interviews were conducted
3 what was done with the data compiled?

4 A The data was analyzed by us in our offices,
5 and subsequently presented to the corporation and to the
6 dealers association.

7 Q What were the major conclusions drawn from
8 the survey conducted, Mr. Kaden?

9 A We determined Midas to be in a unique position,
10 a dominant position in --

11 MR. STAUFFER: I object. That is an opinion
12 concerning market share as we understand it to have been
13 defined previously. We don't understand that to be a
14 purpose of the study as Mr. Kaden has already testified
15 to that purpose.

16 THE COURT: No.

17 MR. ENGLAR: Your Honor --

18 THE COURT: Just a moment.

19 The purpose as defined by the witness earlier
20 included as a primary goal to determine position of Midas
21 in the market. I understand that to be the position of
22 Midas in the market as predicated upon an analysis of
23 data obtained from the sample of persons who were the
24 subject of the research.

25 Overruled.

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2 THE WITNESS: Would you ask your question
3 again, please.

4 Q My question was, what conclusions were drawn
5 after the compilation of the data you have spoken of?

6 A We felt that Midas had a unique position in
7 the muffler business, in the muffler industry, as when
8 we asked people what places they thought of when they
9 thought of a place to replace their muffler, Midas was
10 mentioned by nearly 70% of the people, with the next
11 largest competitor not being a muffler replacement
12 specialist but being Sears. Virtually the vast majority
13 of consumers simply think of, it seems, mufflers as re-
14 lated to Midas as related to mufflers as related to Sears
15 or related to other places where somebody might go.

16 Midas' competition did not seem to be other
17 muffler specialists. Midas' competition seemed to be
18 industries as a whole; the service station industry. I
19 have figures on which I would have to get the source but
20 I believe there are 70,000 independent service stations
21 in this country. They account for 23% of all of the -

22 MR. STAUFFER: Objection. That is not contained
23 anywhere in the study as to which he is testifying and
24 there is no basis for his own knowledge on this.

25 THE COURT: Overruled.

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2 A Service stations as a group, how many thousands
3 there are, account for 23% of all of the mufflers replaced
4 by the people we talked to, where Midas was the second
5 largest source of replacement with 21% going to the 600
6 or 700 Midas shops who replace mufflers.

7 It seemed that Midas was not bucking other
8 specialists, they were bucking the whole industry, being
9 the service station industry or the mass merchandise
10 industry, as opposed to other muffler specialists. There
11 just didn't seem to be any of a national scale that came
12 up here.

13 We determined that Midas' image in terms of
14 consumers was strong, they were known as a company that
15 provided a well-known guarantee, people trusted them, and
16 when we asked that portion of the sample who had not been
17 to a muffler replacement specialist or outlet in the past
18 12 months where they would go next were they to have a
19 problem, 30% said they would go to Midas, which is higher
20 than the 21% who had gone and higher than any of the
21 competitors that they could also have said they might
22 have gone to.

23 THE COURT: I thought you said 70% mentioned
24 Midas as a place they would think of with respect to
25 replacement.

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2 THE WITNESS: Yes, I think -- that is what I
3 mentioned. That is what came to mind. The name that
4 came to mind first. Whether they gone there or not was
5 a separate issue.

6 THE COURT: And pertaining to whether they had
7 gone was?

8 THE WITNESS: 21%.

9 Q You termed your conclusion as to Midas' posi-
10 tion in the market as -- I believe you used the terms
11 "unique" and "dominant."

12 Can you tell us what is meant in market research
13 jargon by the use of the term "dominant" as you have used
14 it?

15 A Well, through our interpretation when a company
16 is so well-known in a field and so dominant in terms of
17 consumer awareness, they have almost a responsibility
18 on top to the industry. They are so well-known in the
19 industry that they almost become generic to the industry,
20 and what they do to a large extent is emulated and followed
21 when leading from such a strong position, so what Midas
22 does would seem to have influence on what the other fac-
23 tions of the industry also do.

24 MR. STAUFFER: I object to that. There is no
25 basis for any comparision of Midas with any other factors

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2 in the industry. There is no testimony that he has
3 worked with anyone aside from Midas.

4 THE COURT: That is your opinion, is that cor-
5 rect?

6 THE WITNESS: Yes, that is my opinion.

7 THE COURT: You don't have the data to show
8 that that occurred, but that is your opinion, is that not
9 the case?

10 THE WITNESS: I do not have data. I have
11 evidence of other muffler specialists offering guarantees
12 like Midas now. I know Sears offers a lifetime guarantee
13 on mufflers which is relatively new for them.

14 Q Do you have any other indicia, apart from the
15 Sears analogy that you have mentioned, which would rein-
16 force your conclusion that Midas is emulated in the
17 muffler industry?

18 A One of the areas that came up as a particularly
19 strong area that consumers wanted to know is when they
20 went into a muffler replacement outlet the price that they
21 were quoted for muffler replacement service was in fact
22 the price they got when they got their bill. There
23 seemed to be a lot of distrust of outlets that do muffler
24 work that the price quoted would not be the actual price
25 when they finally came in to get their car.

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One of the questions asked was the interest in going to Midas if the prices quoted were the actual prices that were finally given the consumer.

Midas, and since then, in Chicago anyway, Carex is now quoting in their advertising a statement saying once we give you a price it is a price we will stand by, and that's a position --

MR. STAUFFER: I must object again. This is talking about, again, as I understand, a consequence of this study. It is something that apparently took place after the study was conducted and after the results were given to Midas.

It in no way reflects Midas' position at any relevant time to this case.

THE COURT: The same ruling.

Go ahead.

A Well, I would say that if a company were in a leadership position within the industry, and what the consumers were asking for was reassurance that a price quoted was the price that they actually paid, the leader taking that position, it would be the first time that it had happened in the market. Apparently, it had been a hard-enough position assuring the consumer the price they were quoted was the price they were getting, so the competition

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2 to Midas in one instance I am aware of has taken up the
3 same claim.

4 Q The survey which was conducted was conducted
5 I believe you said in 18 mostly urban -- in 18 urban
6 markets, is that correct?

7 A That is correct. Urban and suburban, around
8 those urban areas.

9 Q How would your conclusions -- how are your
10 conclusions affected by the existence of muffler replace-
11 ment facilities outside these major urban areas?

12 A I think there is little doubt if our sample
13 was to be enlarged to include all the rural areas through-
14 out the country that Midas' share would go down since
15 they are not represented in major rural areas throughout
16 the country. Nevertheless, I can't imagine their share
17 would go down to such an extent that would preclude the
18 awareness of Midas and their position in the market. It
19 would go down in that they were not serving rural areas,
20 but their dominance in terms of awareness and image I would
21 have to believe would still be one of prominence.

22 Q The period that your survey covered went back
23 to early 1974, is that correct?

24 A Yes. The previous 12 months from June.

25 Q And your conclusion as to the dominance of

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2 Midas is based upon that data, is that correct?

3 A Correct.

4 Q In your experience in market research and as-
5 certaining dominance or leadership positions of a given
6 entity in a market, are you in a position to testify as
7 to the period of time it takes to establish such a domi-
8 nant position?

9 A In my experience dominant positions are not
10 established in one, two, three years. They are established
11 over a long period of time. Rarely have I seen in any
12 way major shifts in market position in one or two years.
13 A company that is accounting for 21% of the market will
14 in the case of Midas take many years, in my opinion, to
15 reach that point and it wouldn't be something that would
16 be achieved from a 5% share to a 21% share in a year or
17 two or three year-period of time. It is something that
18 is fought for and -

19 THE COURT: So that you would think that this
20 survey having covered 1974-1975 the dominant position of
21 Midas was a position which they had moved toward somewhere
22 in the sixties?

23 THE WITNESS: Yes, sir.

24 THE COURT: Mid? Early?

25 THE WITNESS: I don't know. The sixties, the

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2 fifties, however long they have been in business, but it
3 is certain that had not happened in the previous 12 years
4 of our survey.

5 THE COURT: Please continue.

6 MR. ENGLAR: I have no further questions, your
7 Honor.

8 THE COURT: Any questions?

9 CROSS-EXAMINATION

10 BY MR. STAUFFER:

11 Q Mr. Kaden, have you ever performed any similar
12 work or study for Midas aside from the study you have
13 testified to here?

14 A Yes, we have done other work for the Dealers
15 Association.

16 Q What was that?

17 A We have done two surveys in the Chicago Metro-
18 politan area for the dealers there to assess their posi-
19 tion in Chicago. It was a similar study to the national
20 study, this national study, in many respects because we
21 wished to compare some data to how Chicago was versus
22 national. And there were some areas that were custom-
23 designed for the Chicago market.

24 Q I wish to direct your attention to the first
25 page of your study, which is denominated No. 1, entitled

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Kaden - cross

2 Background and Purpose.

3 THE COURT: Referring now to what exhibit?

4 MR. STAUFFER: Defendant's Exhibit E.

5 Q I wish to direct your attention to the first two
6 paragraphs which state, "Midas International is a major
7 factor in the muffler replacement market. In order to
8 maintain and strengthen this position a market research
9 project of national magnitude was undertaken.

10 "The overall purpose of this project, as stated,
11 is to examine the decision-making process in choosing
12 an exhaust repair shop, focusing upon the specific reasons
13 for rejecting or accepting Midas."

14 Is that an accurate statement of the purpose of
15 this study?

16 A Yes, it is the major reason. And the other
17 reasons are also stated.

18 Q The reasons stated below there on the remainder
19 of page 1 and the following pages?

20 A Yes; are no less important to the assessment
21 of the overall reason for doing the study.

22 Q It was not a purpose of the study to present
23 an accurate statistical description of Midas' share of
24 the national market for muffler replacements, was it?

25 A Yes, it was.

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Kaden-cross

2 It was the purpose of this study to determine
3 what their share was on a national level.

4 Q But you didn't conduct this study nationwide,
5 did you?

6 A In markets where Midas was doing business.

7 Q That is different from nationwide, though, is
8 it not?

9 A Yes, it is different from nationwide in that
10 it reflects the areas where they do business.

11 Q I believe you said that these areas were spe-
12 cifically 18 major metropolitan markets?

13 A Correct.

14 Q And is it your testimony that these markets
15 were selected for analysis by Midas and not by yourself?

16 A That is correct.

17 Q I believe the statement of relevant markets, or
18 the 18 markets which you tested, are listed on page 3
19 of Defendant's Exhibit E.

20 Now, the first one, New York, New York, with
21 which you are most familiar, I presume, can you define
22 for me geographically what the New York market is?

23 A The New York market-- in this particular case
24 what it was or what it would be in general?

25 Q Of course, in this particular case.

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2 A In this particular case it was the five
3 boroughs. Calls were made randomly to the five boroughs
4 of New York, the Metropolitan area.

5 Q So at least in the case of New York the
6 Metropolitan area does not at all coincide, for example,
7 with the Census Bureau's Metropolitan statistical area?

8 A I don't know what that is. But if it is not
9 the five boroughs then it wouldn't.

10 Q I believe you said earlier when you selected
11 the major markets it included suburbs, as well, did you
12 not?

13 A Yes.

14 Q But in the case of New York City it did not,
15 it included only the five boroughs within the city limits?

16 A That is correct.

17 THE COURT: Does Miami include Miami Beach?

18 THE WITNESS: Yes, Miami includes Miami Beach.

19 THE COURT: Does Washington, D. C. include por-
20 tions of Maryland or Virginia?

21 THE WITNESS: It would include portions of
22 Maryland and Virginia. When we were thinking of New
23 York and planning the study we were thinking of Manhattan,
24 and the idea was to include a metropolitan area which was
25 not just Manhattan but the other five boroughs which to

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2 our thinking in Chicago was the metropolitan suburban
3 area.

4 THE COURT: What about Philadelphia? Does that
5 include the suburbs of Philadelphia?

6 THE WITNESS: Yes, it does.

7 THE COURT: And Boston, would that include the
8 suburbs of Boston?

9 THE WITNESS: Yes, it would.

10 Q Does there exist anywhere, Mr. Kaden, a listing
11 of the counties or towns covered by each of these areas?

12 A For our survey?

13 Q Yes.

14 A I don't know.

15 Q For example, you just testified that the Washington,
16 D.C. area would include portions of Maryland and portions
17 of Virginia?

18 A We could go back to our source documents and
19 pick up the cities, the metropolitan area for every single
20 respondent, so in that sense they could be traced.

21 MR. ENGLAR: For the record we would have no
22 objection to supplying that information at a future date
23 and making it part of the record if it would benefit the
24 Court.

25 THE COURT: Next question.

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Q Mr. Kaden, would you state briefly the process by which you determined who to call and not to call within, say, New York? Let's be specific with respect to New York.

A We would take the five directories, how many directories there are for the five boroughs. I don't know offhand. We would add up the total number of pages in all five directories and work out a skip pattern so that every respondent had a random opportunity of being dialed on the telephone.

Q What do you mean by a skip pattern?

A Let's assume there are a thousand pages in the directories. What we wanted to do was we wanted to contact 100 people in the area. So what we would do is we would divide the 100 into a thousand pages so that every tenth page we would go to the tenth name on the tenth page and call that person. If that person didn't qualify we would go to the 11th name on the 20th page and so on through the entire directory, which is a totally random skip pattern basis, until we accomplished the quota of interviewing 100 people.

Q Mr. Kaden, I take it you maintain then that that was a random selection process?

A Yes, of the areas defined that we wished to

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2 interview in.

3 Q Would you define for me the word "random" with
4 respect to selection of respondents?

5 A Random is within the universe that you wish
6 to sample everybody has an equal opportunity of being
7 sampled.

8 Q If my name appeared on the 12th page of the
9 Manhattan phone book I wouldn't have an equal opportunity
10 to be selected for a phone call, would I?

11 A You would. As we went through the directory
12 you would have just as equal an opportunity of being
13 selected as somebody in the 19th position because what
14 would happen is --

15 Q That is no chance at all, isn't that right?

16 A It is as equal a chance as anybody else has.

17 Q Except for the fellow who is 10th on the 10th
18 page.

19 A In this case we were doing 100 interviews.
20 If we were doing 150 interviews we would have taken the
21 16th, and then the 16th on the page.

22 Q Are you familiar with a random number table?

23 A Yes.

24 Q Would you describe what it is?

25 A A random number table is a computer-generated

1 list of numbers that allows a totally random sample of
2 people be determined on a priori basis, so that if I
3 take the census tracts of a city and I a priori assign
4 numbers to the houses that I am giving every house an
5 equal opportunity to be selected and the numbers are
6 spewed out and they tell me to go to house 31 first, house
7 62 second.

8
9 Q That wouldn't say something like go to the 10th
10 page and the 10th entry and then go to the 20th page and
11 the 20th entry?

12 A No, it wouldn't.

13 Q Let me take a more simple example.

14 Suppose there are five people who I will call
15 A, B, C, D and E, and I want to select three of them;
16 how would I do that randomly?

17 A You want to select three out of five people
18 randomly?

19 Q Yes. Three out of the given five.

20 A I'm not sure what you are asking. What do you
21 want to do? You want to give everybody an equal op-
22 portunity to be chosen?

23 Q Let me rephrase the question. If I want to
24 pick three out of five people randomly, would you say I
25 was doing it in a random fashion if I put on separate

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2 pieces of paper A, B, C, D and E and put them in a hat
3 and picked them out of a hat?

4 A It is totally random.

5 Q Would you say if I wanted to pick three out of
6 five at random and arbitrarily took A, D and E, would
7 that be random?

8 A No, it wouldn't be random.

9 Q You are maintaining this random really only
10 applies to the 18 major markets?

11 A Yes.

12 Q It is not random to somebody who lives in
13 Phoenix, Arizona?

14 A No.

15 Q Or Honolulu or Indian River or a variety of
16 other areas who had no opportunity to be selected for
17 this interviewing procedure?

18 A Correct. It is random within the areas that
19 we wished to interview in, which was a business decision
20 that was made.

21 Q I believe you stated earlier that Midas' share
22 of the market is relatively strong in the urban areas you
23 selected and relatively weak everywhere else, or at least
24 in other areas?

25 A I stated that Midas told us that these were

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2 markets representing a major proportion of their business
3 and therefore the opinions of people in these markets
4 were satisfactory enough for us to sample, that it wasn't
5 relevant for us to sample markets where Midas did not do
6 business or did not do a major share of business.

7 They didn't want to go into markets where they
8 had no shops. The findings would not be relevant.

9 Q Wouldn't be relevant for what?

10 A For the market where they didn't have any shops.

11 Q Wouldn't be relevant for what purpose?

12 A Analyzing data. What it would do is say you are
13 not in this market, therefore your share where you are not
14 is not reflective. They want to know what their share
15 situation, what their position is, where they have an
16 opportunity of gaining customers.

17 THE COURT: What about all the other people who
18 have vehicles which require mufflers; for example, suppose
19 I told you in New York State there were some 1600 cities,
20 towns and villages, and so far on this list you have one
21 New York community that I see, and that is the five
22 boroughs of Manhattan. That's one city. What about
23 the other people who are the balance of that 1600 cities,
24 towns and villages with vehicles which have mufflers and
25 require replacements?

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2 THE WITNESS: If the purpose of the survey is
3 to determine what the potential is for business where
4 shops don't presently exist then it would be appropriate
5 to do a survey there.

6 If the purpose of the study is to determine
7 what the position is where they have the opportunity to
8 do business, which was the case here, that's why we
9 sampled there.

10 It was to tell them to go to other markets be-
11 cause the potential is there. It was to say: What is the
12 potential in markets where they presently do business.

13 THE COURT: It is conceded that if there are
14 1600 cities, towns and villages in New York State, and
15 you only studied one of them, to wit, New York, admittedly
16 with some 8 million people or so, that you have left
17 another 8 or 10 million people unaddressed, many of whom
18 also have vehicles which require mufflers.

19 THE WITNESS: Yes, that is correct.

20 THE COURT: Your starting point assumed that
21 you had no share of that market worth mentioning-- that is,
22 the market outside New York?

23 THE WITNESS: Correct. They didn't want to find out
24 what their position is where they couldn't do business at
25 this time. It wasn't important to them. It was important

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2 to them to optimize where they were.

3 THE COURT: All right.

4 Q Mr. Kaden, I noticed in your report the base
5 figure, which I understand to be the initial phone calls,
6 the initial contacts, numbered some 20,000.

7 A Yes. That's right.

8 Q Would you please describe to me the process
9 you went through in narrowing that 20,000 down?

10 A I don't have a questionnaire, and I would need
11 that. I'm sure it is in evidence in the back of one of
12 these reports.

13 MR. ENGLAR: May I hand one to the witness,
14 your Honor?

15 THE COURT: Yes.

16 (Document handed to witness)

17 A If you turn to the questionnaire, which is page
18 103 - - it starts on page 103 of this report, the first
19 question was asked: "We are conducting a study today
20 about products relating to your automobile and I wonder
21 if you have a few minutes to answer a few questions."

22 The first question then was -- that was a
23 contact right there. The person could say "No" and hang
24 up, which happens. If a person says "Yes, I would be
25 interested, I will go further with you," you say, "Do you

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2 own an automobile?"

3 If they say "No," they would be tallied and
4 hung up on, and that would be part of the 20,000.

5 If they say "Yes," we would say, "Are you the
6 person who is primarily responsible for the care and
7 maintenance of the automobile in your household?"

8 If the persons says "No," that would be part of
9 the 20,000 and we would hang up.

10 If they say "Yes," we would say, "Do you or any
11 member of your family work for an advertising agency, market
12 research firm or in the automobile industry?" We didn't
13 want to talk to people in our own industry.

14 If they said they worked in those industries
15 that would be part of the 20,000, and we would terminate
16 those people.

17 We would say, "During the past 12 months" --

18 Q I think that is a sufficient answer to my ques-
19 tion for the time being.

20 I direct your attention to page 4B of the market
21 research study, Defendant's Exhibit F, which in the first
22 table indicates that 29% of those listed in the first
23 table have replaced a muffler in the past 12 months and
24 it lists as base contacts 20,615.

25 A Right.

Kaden-cross

md:mq

Q Do I take it to be 29% of these 20,000 have replaced a muffler in the last 12 months?

A 29% of the people replaced a muffler in the past 12 months. That 29% of 20,615 will not be 842 because what happened is we wanted to make sure in the survey we had enough people who had gone to the various muffler replacement outlets, service stations, Midas, other specialists, in order to draw statistically valid data. So we kept two tallies: one, a tally of people who had mufflers replaced, which was the 29%, and based on 20,615. The 842 was developed through a quota system.

Q By my calculations, and you should feel free to check me, 29% of 20,615 is 5,978, or approximately 6000 people.

A Correct.

Q That's the number of people who you contacted who had replaced a muffler within the past 12 months?

A Right.

Q The lower part of page 4, you gave a figure of 842.

A Yes. I just explained that. We didn't take all 6000 of those people because we wanted to quota-sample people, so we took -- we found a lot of people who had replaced their mufflers and had replaced it at Midas or

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2 had replaced it at a garage and service station, and we
3 were not interested in that point in the survey in talking
4 to people who had gone to Midas any further. We had
5 enough people in our sample to analyze that base.

6 So we terminated those people at that time. It
7 is like a funnel.

8 Q So these figures listed at the lower part of
9 page 4B are not an accurate representation of the number
10 of muffler replacers who actually went to Midas within
11 the past 12 months?

12 A Yes, they are, they absolutely are.

13 Q You just said that 842 was not randomly selected
14 from the 6000, it was selected by means of a quota.

15 A And if you were to repeat that again and to do
16 it in identically the same way those numbers would come
17 out to within 2% to 3% with the sampling technique that
18 we used.

19 Q If I understand what you are saying, if you
20 had on your list relatively many muffler replacers who had
21 gone to mass merchandisers, which is one of your cate-
22 gories, for the last muffler as compared to the number
23 who had changed the muffler themselves, which is another
24 of your categories, do I understand you to say that some of
25 the former category was eliminated for that reason alone?

md:mq

Kaden-cross

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2 A Yes, but it was not tallied, it was not tallied
3 to show the share information. It is included in the
4 share information. We did not go on and ask the other
5 attitudinal information of those people but it was in-
6 cluded as part of the share data.

7 Q So is this 21% on page 4P 21% of 842 or 21%
8 of 6000?

9 A It is 21% of 842.

10 Q I am afraid you have not answered my question,
11 Mr. Kaden.

12 A You have to look at the lowest number, which
13 is new car dealers. It is 8%. In order to get a sample
14 of enough new car dealers to analyze patterns of new
15 car dealers you need a certain number of people. In our
16 case we wanted to get up to at least 75.

17 8% of 842 is roughly 75 people. So when we got
18 to a certain point where we had represented all the other
19 categories, and we were finding replacers for the other
20 categories as part of those 20,000 contacts we included
21 that as part of our share data but we didn't go on and
22 collect the information any more.

23 Q As to where they replaced it?

24 A No, as to their attitudes and their images.
25 We collected the data as to where they replaced it.

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2 Q Let me ask the question the other way around.
3 29T of your 20,000 figure have replaced a muffler in
4 the past 12 months -- that is 12 months prior to the ask-
5 ing of the question?

6 A Right.

7 Q What percentage of that 6000 replaced them at
8 Midas?

9 A 21%.

10 Q So you actually have responses that roughly --

11 A To share information, that is correct. To share
12 information. Not to the entire questionnaire.

13 If you look on the questionnaire --

14 Q Mr. Kaden, the share information you are refer-
15 ring to is this figure in the second table on page 4B,
16 is it not?

17 A It is.

18 Q You have no other basis for your 21% aside
19 from that 842, do you?

20 A I have tally sheets of people that I terminated
21 who had told me Midas. That 842 represents a satellite
22 sample, a subsample of people who I was able to generate
23 share information from. It is representative of -- if
24 I had done 6000 and that base down there was 6000 the
25 same thing would have happened, the same figures would have

1 md:mg

2 been generated.

3 I don't know how else to explain it, I'm sorry.

4 Q Let me try it one more time, Mr. Kaden.

5 You have 6000 people who replaced their mufflers.
6 You have 842 who are listed as your base contacts and from
7 whom these percentage figures are derived?

8 A Right.

9 Q Are you telling me that of the remaining 5200
10 8% of them were replaced by new car dealer, 10% were re-
11 placed by a mass merchandiser?

12 A Yes, that's what I am saying.

13 Q And so forth?

14 A Yes.

15 Q What was the basis for picking one of the 842
16 who were used for the rest of your questionnaire as op-
17 posed to those who were left out?

18 A Quotas. We had reached a certain quota of
19 people where we didn't want to talk to those people any
20 further.

21 Q That's not random, is it?

22 A It is random as far as share is concerned, it
23 sure is.

24 Q As to the people who you had selected even among
25 the 6000 not every one of those 6000 had the same opportunity

1 md:mq
2 to be among the final 842, isn't that correct? It is
3 only if it had occurred in the front of the list?

4 A That's correct. After we had reached a quota,
5 that is correct.

6 Q Now, your final group of interviewees according
7 to this table included 597 male heads of household who
8 had replaced the muffler within the previous year, is that
9 correct?

10 A Right.

11 Q You didn't interview women, did you, Mr. Kaden?

12 A No, we didn't.

13 Q They were specifically ruled out of your sur-
14 vey, were they not?

15 A Yes, sir.

16 Q Did you interview teenagers, for example, teen-
17 age males who were not heads of household?

18 A Yes, teenagers could have been in here who were
19 not heads of household..

20 Q I direct your attention to page 3 of the survey
21 which says, "Because male heads of household were inter-
22 viewed all interviews were conducted during the evening
23 and weekend hours."

24 Doesn't that indicate, for example, that teen-
25 agers --

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A A teenager could have picked up the phone.

Q But he is not a head of household?

A It was asked: Are you the person who is primarily responsible for the care and maintenance of automobiles in your home? The likelihood a teenager would be responsible for that is low, but it could have been a teenager.

Q Incidentally, Mr. Kaden, to your knowledge there are women who are heads of household, are there not?

A Yes, there are.

Q There are probably a fairly substantial number, isn't that correct?

A Correct.

Q Again, I direct your attention to page 4B of the survey which indicates that of the people in this survey 21% last replaced their mufflers at Midas.

I also direct your attention to page 5 and the second table which says where the muffler would be replaced next, it says 30% or 29%, depending upon whether they have replaced a muffler in the last 12 months.

A Right.

Q What do those figures indicate to you concerning consumer awareness or consumer attitudes?

A They indicate to me that Midas will do better

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2 in the future than they have in the past because more
3 people indicated they would go to Midas next time they
4 wished to have their muffler repaired than went in the
5 previous 12 months.

6 Q On the basis of your research for this study,
7 would you say that that growth trend was true for the
8 previous years prior to the taking of this survey?

9 A I don't know whether the growth trend was up
10 or down since 1971. I would assume they are opening more
11 shops, therefore the growth trend would be up. So I would
12 assume that it had been a growing trend, yes.

13 Q If that is true that the 21% in 1975 is the
14 highest figure that they would have had during 1971, 1972
15 and 1973 then their awareness rating would have been
16 lower according to what you just said, isn't that cor-
17 rect?

18 A I would assume so, yes.

19 Q As a matter of fact, awareness is a very
20 different thing than where people actually replace the
21 muffler, is it not?

22 A Yes, it is.

23 Awareness is one thing; where they replace is
24 something else.

25 Q Indeed, your survey shows at page 6 that the

1 md:mq

2 awareness of Midas brand is 70% among those people inter-
3 viewed?

4 A Correct.

5 Q But only 21% of those who had replaced a muffler
6 had actually gone to Midas, isn't that correct?

7 A That is correct. That in our opinion would be
8 a high conversion.

9 Q Finally, Mr. Kaden, did you talk, in conducting
10 this survey, with any other muffler dealers aside from
11 Midas dealers?

12 A No, sir.

13 Q Did you interview any independent service
14 stations?

15 A No, sir.

16 Q Did you interview any Sears outlets?

17 A No.

18 Q Did you interview any Midas dealers themselves
19 aside from the initial discussions you had when the study
20 was formulated?

21 A With regard to what?

22 Q With regard to the subject of the study. With
23 regard to--

24 A No, they are not included in our sample, if that
25 is what you mean.

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2 Q How many Midas dealers did you talk with during
3 the whole conduct of this study?

4 A At one point there was a committee appointed
5 that helped us to develop the questionnaire. I believe
6 there were six to eight. At the end of the survey I
7 presented this data at the national convention, and to the
8 best of my knowledge, about 80 to 90% of the dealers in
9 the association were at that convention.

10 Q But prior to the completion of the study you
11 had only talked to I believe you said six or eight?

12 A Yes, that's right.

13 MR. STAUFFER: No further questions, your
14 Honor.

15 THE COURT: Any redirect?

16 MR. ENGLAR: Very brief redirect, your Honor.

17 REDIRECT EXAMINATION

18 BY MR. ENGLAR:

19 Q Mr. Kaden, you mentioned the term and described
20 the term "skip pattern."

21 Is that a recognized statistical method of ar-
22 riving at random numbers?

23 A Yes, it is.

24 Q On what basis do you conclude that that is a
25 recognized statistical method?

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2 A From the courses I have taken, books I have
3 read, and as a buyer of research for eleven years prior
4 to what I am doing now it was a recognized technique by
5 the suppliers that I used.

6 Q With reference to counsel's inquiry regarding
7 your findings on page 4B of the study, and the 29% and
8 the 21% figures, how is the quota to which you referred ar-
9 rived at?

10 A It is a business decision that is made in planning
11 the study. You wish to have a certain number of people in
12 each group so that that group is represented by enough
13 people to be statistically reliable.

14 In generating those quotas, though, you want
15 to be very careful not to misrepresent the share figures,
16 so that you must collect in your collection of the data
17 up to a certain point, which in this case included share
18 figures, and then cut off questioning of those people
19 on the attitudinal figures, on the attitudinal part of the
20 questionnaire for those people whose opinions have already
21 been generated in sufficient numbers.

22 Q Is the quota system or the quota method
23 that you have described recognized as a statistically re-
24 liable method based upon your experience?

25 A Yes. If it were not, market research would not

be a viable profession.

Q During your testimony on this matter earlier I believe you said that there was -- if you were to conduct it over again, conduct the same type of survey over again you would obtain the same results.

A Within 2 to 3% error.

Q In other words, the statistical reliability of the method that you have employed is such that if you were to do this again it is possible that the figure would read instead of 21%, 18 or 19%, and it is also possible that it might read 23 or 24%, is that correct?

A That is correct.

Q In response to a question posited by the Court--

I am paraphrasing, I wasn't able to get it down quite correctly -- but I believe your response to the question -- in areas in New York State outside New York City did you-- wasn't it an accepted fact that Midas, and here is where I am paraphrasing, did not have a share of the market worth noting, and I believe your answer was "Yes, that's true."

Now, are you aware as to whether or not there are Midas shops in Long Island or in Westchester County?

A I don't know if there are or not.

Q Are you aware if there are Midas shops in Buffalo or Syracuse?

1
2 A No.

3 Q Or Albany or Yonkers or Rochester?

4 A No.

5 Q One final question or line of questions, Mr.
6 Kaden, and that is, you have answered a question as to
7 who it was that was interviewed by referring to male heads
8 of household, and I believe that is referred to on the top
9 of page 3.

10 It is stated because male heads of household
11 were interviewed all interviews were conducted during the
12 weekend and week night hours.

13 Should the word "only" be inserted here? Should
14 it read "Because only male heads of household were inter-
15 viewed"? Is that a limitation that was in this survey?

16 A No. And the likelihood of them being male
17 heads of household is very high.

18 Q You mean the likelihood of the heads of house-
19 hold being male was high, is that what you are saying?
20 I am trying to understand.

21 A We wanted to talk to males first of all who
22 were responsible for the care and maintenance of their
23 automobile. Those people were likely to be male heads of
24 household.

25 Q Why did you limit your survey to males?

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2 A Economic reasons. Because I believe Midas had
3 some previous information that said that 75% to 80% of
4 the muffler buying decisions in this country were made
5 by men. For us to reproduce this survey among women
6 would have been unaffordable to them. And because the
7 major decisions that would be made, since the buying
8 decision was in the majority a male-buying decision would
9 be enough for their purposes.

10 MR. ENGLAR: Thank you, Mr. Kaden.

11 No further questions.

12 RECROSS-EXAMINATION

13 BY MR. STAUFFER:

14 Q I believe you just said that Midas told you
15 that at least 75 to 80% of the muffler-buying decisions
16 were made by males.

17 Do you know that of your own knowledge?

18 A No, sir.

19 MR. STAUFFER: I move to strike the response to
20 the previous question.

21 THE COURT: Denied.

22 Next question.

23 Q You talked about the process whereby you called
24 families, interviewees in New York.

25 How many people in New York were making those

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2 phone calls?

3 A I don't know offhand. It was done from a
4 central facility where the number of interviewers at
5 any one time could be as low as several to a high as 20.

6 Q But for any given metropolitan area there was not
7 likely to be more than one or two?

8 A At any one time that's true. The interviewers
9 were rotated so that you wouldn't have one interviewer
10 only calling California, one interviewer only calling
11 New York.

12 Q But at any given time you only had one calling
13 New York who might be succeeded on different shifts?

14 A I don't know. At a time when we finished our
15 quota of New York interviews the interviewing corps would
16 turn their attention to another city and they may be work-
17 ing on that city to build up their quota, so it is quite
18 possible that all 20 interviewers could have been working on
19 one city at one time.

20 Q I understand from what you said that the inter-
21 views went through the phone book from page 1 to the end
22 of the phone book using the skip system, is that correct?

23 A Right. In the particular city.

24 Q If my name is very low in the alphabet, that is,
25 near the end, I was less likely of actually being

1 md:mq

2 analyzed in the attitudinal survey than someone whose
3 name is very close to the front of the alphabet, isn't
4 that true?

5 A No. It depends on what point we reach you in
6 our questioning procedure. If your name is low in the
7 alphabet and you are a new car dealer, purchaser, where
8 you had purchased your muffler, and you are the last
9 person that we have to quota sample, then we will take
10 you.

11 Q I understand that. But --

12 MR. ENGLAR: I thought cross-examination had
13 been complete. It seems we are starting in again.

14 THE COURT: Sustained.

15 Anything further?

16 MR. STAUFFER: No further questions.

17 THE COURT: Step down.

18 (Witness excused)

19 MR. ENGLAR: I have a brief closing remark but
20 before --

21 THE COURT: Is that all the evidence?

22 MR. ENGLAR: The plaintiff rests.

23 THE COURT: Does the defendant rest?

24 MR. SALERNO: Yes. And of course moves for
25 a judgment dismissing the complaint at the close of all

1 the evidence and at the close of the plaintiff's case.

2 THE COURT: A brief closing statement, please.

3 MR. ENGLAR: Your Honor, if I may, before -- I
4 do have a brief closing statement, I assure you, but prior
5 to reconvening after lunch, the Assistant U. S. Attorney
6 and myself agreed with the Court's permission that we might
7 reserve Plaintiff's Exhibit 8, the certificate of in-
8 corporation of the plaintiff, which does not appear in the
9 record at this time. We feel it would be beneficial
10 to have it in to complete the record.
11

12 MR. SALERNO: No objection.

13 THE COURT: Received.

14 (Plaintiff's Exhibit 8 received in evidence)

xx 15 MR. ENGLAR: It is not my intention, and I
16 really have no intention or there is no need to burden
17 the Court with extensive argument. I believe your Honor
18 well understands the issues in this case at this point,
19 and our position is clearly stated in our trial memorandum.

20 In essence, we would rely upon that argument
21 and the opening statements we made earlier. Nothing
22 that has transpired today has changed our basic position,
23 and that position, your Honor, is that we need not even
24 inquire into, (1) the share of the market held by Midas,
25 nor do we need inquire into the public benefit resulting

1 md:mq
2 from the existence of the plaintiff association.

3 We do feel that the share of the market is suf-
4 ficient to constitute Midas as a "line of business" for
5 purposes of the regulation, if that inquiry need be reached.

6 We do believe that if the inquiry of public
7 interest need be reached that there is sufficient public
8 benefit to justify the grant of the requested exemption.

9 However, as stated, we don't believe that need
10 be reached.

11 Quite simply, our position is that an ob-
12 jective and fair look at the statutory language, and the
13 definitive language, the defining language in the Treasury
14 regulation which defines "business league" makes it emi-
15 nently clear that the plaintiff association is entitled
16 to the exemption which it has sought.

17 The plaintiff association is an association
18 of persons having a common business interest, the purpose
19 of which is to promote such common interest and not to en-
20 gage in a regular business of a kind ordinarily carried on
21 for profit.

22 I was just quoting the regulation, the language
23 after that we maintain and we have so argued in our
24 memorandum is nothing more than language seeking to
25 exemplify and provide examples of the nature of entities

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entitled to the regulation.

My temptation is to continue, your Honor. I will not, however, because this trial has gone far longer than I had anticipated and I am sure we are all tired.

I just want to point out one thing that ought not be overlooked. There has been a consistent temptation by the government to point out that the benefits to be accrued by joining the plaintiff association are benefits which go to the profits of Midas dealers, the franchisees, go to improve the efficiency of their business, and we don't deny that. It has been recognized judicially, and we have cited it in our memorandum, and it is nothing more than human nature that nobody will join in an organization unless to some extent they are benefited thereby. Certainly nobody is going to join in such an organization and pay dues unless they are to be benefited by it.

Our basic point, however, is that that fact hardly precludes entitlement to the exemption.

Members join a chamber of commerce because they are benefited by it. They are clearly entitled to the exemption. Members join any organization because they will benefit by it.

The question is what did the legislature

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2 intend in light of the continuing economic developments
3 and the development of the franchise industry throughout
4 the country as a major marketing force in our economy.
5 Clearly a franchisee association such as the plaintiff
6 association is entitled to the exemption and it does not
7 lose that entitlement because it is limited to members
8 of one particular franchisor.

9 Thank you, your Honor.

10 THE COURT: Very briefly, Mr. Salerno.

11 MR. SALERNO: I will be brief, your Honor.

12 It should be noted, though, we have heard some
13 testimony, a lot of testimony, about share of the market
14 and dominance of the market.

15 We suppose that that is intended to prove that
16 Midas muffler dealers do indeed constitute a line of
17 business within the meaning of the regulation. Otherwise,
18 we can see no relevance to it whatsoever.

19 We think it is perhaps self-evident that it
20 is not probative of any such thing. The figures have
21 been bandied about, but whatever they show, they show a
22 maximum of approximately 20% of the market at some recent
23 date was held by Midas, and 80% held by a lot of other
24 muffler dealers.

25 Mr. Kaden's testimony about -- he defined

1 md:mq

2 dominance as resulting entirely from the fact the Midas
3 name was so well-known and that was in turn derived from
4 the 70% awareness response of many people, even though
5 only 30% of the same people interviewed said they would
6 actually go to Midas to get a muffler.

7 Quite simply we don't believe the public aware-
8 ness of a brand name has anything to do with the line
9 of business within the meaning of the regulation.

10 The only thing that would be probative, we
11 think, and we think it is supported by the law, is if
12 the plaintiff association represents an entire line of
13 business and this Court ruled the line of business ap-
14 plicable to this case was the muffler industry.

15 It is quite clear that at most plaintiff has
16 20% of the muffler industry. That can't conceivably
17 be a line of business within the meaning of the applicable
18 regulation.

19 Mr. Englar makes the good point that nobody
20 would join an association if he didn't benefit from it.
21 It is quite clear deriving a benefit from membership does
22 not eliminate the possibility of receiving an exemption.

23 The fact remains that to the best of our
24 knowledge no case allows the exemption where the result
25 of the association's activities is to improve the

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2 competitive position of its members vis-a-vis others in
3 the same market and in the same industry.

4 If indeed plaintiff represented all muffler
5 dealers in the country there would be an entirely dif-
6 ferent case before this Court, but where they don't, and
7 the most the plaintiff can contend is that as a result of
8 their activities Midas dealers will sell more mufflers
9 to the competitors' disadvantage or detriment in the open
10 market of other muffler dealers in the same line of busi-
11 ness, it seems quite evident that they are not improving
12 conditions in the entire line of business but only for
13 their own members which constitute a small portion of that
14 line of business.

15 The remaining contentions, your Honor, are
16 well set out, I believe, in the memos of law and we re-
17 spectfully request judgment be entered dismissing the
18 complaint of this action.

19 (continued on next page)
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THE COURT: This tax refund action having

been tried before this Court without a jury on May 24, 1977, the Court now makes the following findings of fact and conclusions of law pursuant to Rule 52(a) Federal Rules of Civil Procedure.

Findings of Fact:

1. Plaintiff, National Muffler Dealers Association, Inc., was organized on January 18, 1971 under the New York Not-For-Profit Corporation Law as a trade association of Midas Muffler franchisees.

2. On or about December 29, 1971, plaintiff filed with the Internal Revenue Service, on Form 1024, an application seeking a tax exemption as a business league under Section 501(c)(6) of the Internal Revenue Code ("the Code").

3. On or about March 28, 1972, the above application was denied. After a District Conference on October 4, 1972, the denial was confirmed by letter dated June 18, 1974.

4. On or about July 22, 1974, plaintiff filed returns and made tax payments for the fiscal years ending November 30, 1971, 1972, and 1973. The payments were in the sums of \$1,237.00, \$1,431.00, and \$2,689.00 for each of the above years respectively, for a total sum of \$5,357.00.

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2 5. On or about September 24, 1974, plaintiff
3 filed claims for refund of the aforesaid amounts with the
4 Internal Revenue Service on the ground that its application
5 for exemption as a business league had been erroneously
6 denied.

7 6. By letter dated March 24, 1975, the
8 Internal Revenue Service notified plaintiff that the re-
9 fund claim for fiscal year 1972 had been disallowed.

10 7. All of the plaintiff's members are
11 Midas Muffler franchisees and throughout its history
12 plaintiff has had no member who is not a Midas Muffler
13 franchisee.

14 8. On October 23, 1972, plaintiff's by-laws
15 were amended to eliminate the word "Midas" so that member-
16 ship was available to any franchised muffler dealer.

17 9. Despite this amendment, plaintiff has not
18 solicited membership by non-Midas dealers, and a
19 solicitation letter seeking new members, dated November
20 27, 1975, begins "Dear Fellow Midas Dealer."

21 10. The plaintiff's principal activities are:
22 (1) acting as a bargaining representative for its members
23 in their dealings with their franchisor, Midas International;
24 (2) the publication of a newsletter; (3) annual conventions;
25 and (4) two insurance programs for its members.

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11. The plaintiff's principal accomplishments as a bargaining representative are the gaining of recognition by Midas International; the negotiation of a more favorable franchise agreement; and the elimination of a replacement service charge imposed upon customers taking advantage of the Midas Muffler guarantee.

12. There is no evidence that plaintiff confers a benefit on the muffler industry as a whole or upon muffler franchisees as a group. Plaintiff's newsletter and other information are disseminated only to Midas dealers, and its bargaining activities, which constitute its most important function, are for the benefit of Midas dealers alone.

13. Midas dealers alone do not constitute a line of business. The Court finds that plaintiff has failed to establish by a fair preponderance of the credible and competent evidence the market share held by Midas International during the years at issue.

14. Plaintiff's evidence demonstrates that, at best, plaintiff has conferred merely an indirect benefit to the public through certain price reductions and services. There is no evidence of any direct benefit to the public.

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2 CONCLUSIONS OF LAW

3 The law applicable to this case has been
4 set forth in the Court's decision on the summary judgment
5 motions; in this Court's judgment, the result herein
6 must be controlled by the decision of the Circuit Court in
7 Produce Exchange Stock Clearing Assn. v. Helvering,
8 71 F. 2d 142, (2d Cir. 1934) (Swan, J.)

9 The Produce Exchange decision is the law of
10 this Circuit and that decision binds this Court. Accord-
11 ingly, the Court rejects plaintiff's contention that this
12 case should be governed by the decision of the Seventh
13 Circuit in Pepsi-Cola Bottlers' Assn. v. United States,
14 369 F.2d 250 (7th Cir. 1966). Accordingly the Court
15 makes the following further conclusions of law.

16 1. This Court has jurisdiction of this
17 action under 28 U.S.C. Section 1346(a)(1).

18 2. To be an exempt business league under
19 Section 501(c)(6) of the Internal Revenue Code, an
20 organization's activities must, during the tax years for
21 which a refund is sought, i.e., 1971, 1972 and 1973, be
22 "directed to the improvement of business conditions of one
23 or more lines of business as distinguished from the per-
24 formance of particular services for individual persons."
25 Treas. Reg Section 1.501(c)(6)-1. An organization that

1 md:mg 5

2 "merely serves each member as a convenience or economy
3 in his business" is not a business league. Produce
4 Exchange Stock Clearing Ass'n v. Helvering, 71 F. 2d 142,
5 143-44 (2d Cir. 1934).

6 3. In the case at bar, the applicable
7 industry is the muffler industry, and the applicable
8 "line of business" is the business of muffler franchisees
9 taken as a whole. Midas Muffler franchisees do not
10 constitute a "line of business" as that term has been
11 construed by the cases.

12 4. Since plaintiff's activities during
13 the year in question were not "directed to the improvement
14 of business conditions" in any "line of business" within
15 the meaning of the applicable regulation, and since
16 the plaintiff's activities rendered no direct benefit
17 to the consuming public, plaintiff was not, during the
18 years in question, a "business league" within the meaning
19 of Section 501 (c) (6) of the Internal Revenue Code.

20 5. Accordingly, the Court concludes that
21 plaintiff has failed to establish the necessary elements
22 of its case by a fair preponderance of the credible
23 evidence.

24 Judgment should be entered for the defendant
25 the United States of America, dismissing the complaint in

md:mg 6

all respects with prejudice and costs. Counsel for
the defendant is directed to submit an appropriate order
of judgment.

SO ORDERED.

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WITNESS INDEX

<u>Name</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Meyer P. Gordon	21	41		
Gilbert Alvin Meisgeier	45			
Robert J. Kaden	70	106	128	132

EXHIBIT INDEX

<u>Plaintiff</u>	<u>Identification</u>	<u>In Evidence</u>
8		135

PLAINTIFF'S EXHIBIT 1 - APPLICATION FOR EXEMPTION

FORM 1024

(Rev. March 1964)
U.S. Treasury Department
Internal Revenue Service

EXEMPTION APPLICATION

(To be made only by a principal officer of the organization claiming exemption)

To be filed in duplicate
with the District Director
for your District.

For the use of organizations applying for exemption under section 501 (a) of the Internal Revenue Code which are described in the following subsections: (Check the applicable subsection.)

☐ Section 501 (c) (4)—Civic leagues or social welfare organizations (including posts, councils, etc., of veterans' organizations).

☐ Section 501 (c) (4)—Local associations of employees.

☐ Section 501 (c) (5)—Labor, agricultural, or horticultural organizations.

☒ Section 501 (c) (6)—Business leagues, chambers of commerce, etc.

☐ Section 501 (c) (8)—Fraternal beneficiary societies, etc.

EVERY ORGANIZATION THAT CLAIMS TO BE EXEMPT MUST FURNISH THE INFORMATION AND DATA SPECIFIED IN DUPLICATE. IF ANY ORGANIZATION FAILS TO SUBMIT THE INFORMATION AND DATA REQUIRED, THIS APPLICATION WILL NOT BE CONSIDERED ON ITS MERITS AND WILL BE RETURNED.

1a. FULL NAME OF ORGANIZATION

NATIONAL MUFFLER DEALERS ASSOCIATION, INC.

b. EMPLOYER IDENTIFICATION NUMBER
(See Instruction F)

237118946

2. COMPLETE ADDRESS (Number, street, city or town, State and Postal ZIP code)

32 East 57 St., New York, N.Y. 10022

3. DATE SUBMITTED

Jan. 6, 1972

4a. IS THE ORGANIZATION INCORPORATED?

☒ Yes ☐ No

b. IF "YES," IN WHICH STATE AND UNDER WHICH LAW (GENERAL CORPORATION, NOT FOR PROFIT, MEMBERSHIP, EDUCATIONAL, ELEMOSYNARY, ETC.)? CITE STATUTORY PROVISIONS.

New York Section 402 of the Not-For-Profit Corp. Law

c. IF NOT INCORPORATED, WHAT IS FORM OF ORGANIZATION?

d. DATE INCORPORATED OR ORGANIZED

Jan. 18, 1971

e. MONTH AND DAY ON WHICH THE ANNUAL ACCOUNTING PERIOD ENDS

11-30-71

5a. HAS ORGANIZATION FILED FEDERAL INCOME TAX RETURN (S)?

☐ Yes ☒ No

b. IF "YES," FORM NUMBER OF RETURN FILED AND INTERNAL REVENUE DISTRICT WHERE FILED.

c. YEAR(S) FILED

6a. ARE YOU THE OUTGROWTH OR CONTINUATION OF ANY FORM OF PREDECESSOR(S)?

Yes No
☐ ☒

If "Yes," attach a statement indicating the name of your predecessor(s), the period during which it was in existence, and the reasons for its termination. Submit copies of all papers by which the transfer of assets, if any, was effected.

b. IS CAPITAL STOCK ISSUED AND OUTSTANDING?

☐ ☒

If "Yes," attach a statement indicating (1) class or classes of such stock, (2) the number and par value of the shares, (3) the consideration for which issued, and (4) whether any dividends have been paid or whether your certificate of organization authorizes such payment on any class of such stock.

c. HAVE YOU MADE OR DO YOU PLAN TO MAKE ANY DISTRIBUTION OF YOUR PROPERTY OR SURPLUS TO SHAREHOLDERS OR MEMBERS?

☐ ☒

If "Yes," attach a statement containing full details, including (1) amounts or value, (2) source of funds or property distributed or to be distributed, and (3) basis of and authority for distribution or planned distribution.

d. DOES ANY PART OR WILL ANY PART OF YOUR RECEIPTS REPRESENT PAYMENT FOR SERVICES OF ANY CHARACTER RENDERED OR TO BE RENDERED?

☐ ☒

If "Yes," attach a statement explaining in detail.

e. HAVE YOU MADE OR DO YOU PLAN TO MAKE ANY PAYMENTS TO MEMBERS OR SHAREHOLDERS FOR SERVICES RENDERED OR TO BE RENDERED?

☐ ☒

If "Yes," attach a statement furnishing a detailed explanation of the amount so paid or to be paid and the character of the services rendered or to be rendered.

f. DOES ANY PART OR DO YOU PLAN TO HAVE ANY PART OF YOUR NET INCOME INURE TO THE BENEFIT OF ANY PRIVATE SHAREHOLDER OR INDIVIDUAL?

☐ ☒

If "Yes," attach a statement explaining in detail.

g. DO YOU PAY OR DO YOU PLAN TO PAY SICK OR DEATH BENEFITS, OR PENSIONS OR ANNUITIES TO YOUR MEMBERS?

☐ ☒

If "Yes," attach a statement explaining the rules for eligibility.

7. YOU MUST SUBMIT COPIES OF ALL ADMINISTRATIVE OPINIONS AND SUBMIT CITATIONS OF ALL JUDICIAL DECISIONS AS WELL AS COPIES OF APPLICATIONS OR REQUESTS FOR SUCH OPINIONS AND DECISIONS (IF ANY) RELATING TO THE FOLLOWING QUESTIONS:

a. HAVE YOU EVER RECEIVED OR REQUESTED ANY EXEMPT OR SPECIAL STATUS UNDER THE LAW OF THE STATE OF YOUR INCORPORATION OR OPERATION, SUCH AS INCOME OR PROPERTY TAX EXEMPTION?

Yes No
☐ ☒

b. ARE YOU UNDER THE SUPERVISORY JURISDICTION OF ANY STATE, COUNTY, OR CITY REGULATORY BODY, SUCH AS THE SOCIAL WELFARE AGENCY, BOARD OF REGENTS, ETC., OR HAS SUCH STATUS EVER BEEN REQUESTED?

Yes No
☐ ☒

c. HAS ANY COURT (INCLUDING A COURT OF PROBATE, SURROGATE'S COURT, ETC.) EVER DECLARED THAT YOU WERE ORGANIZED AND OPERATED FOR CHARITABLE, ETC., PURPOSES?

☐ ☒

8. IF YOU ARE CLAIMING EXEMPTION AS AN ORGANIZATION DESCRIBED IN SECTION 501 (c) (4) AS A LOCAL ASSOCIATION OF EMPLOYEES, ATTACH A STATEMENT GIVING NAMES AND ADDRESSES OF EMPLOYERS WHOSE EMPLOYEES ARE ELIGIBLE FOR MEMBERSHIP IN THE ASSOCIATION. IF EMPLOYEES OF MORE THAN ONE PLANT OR OFFICE OF THE SAME EMPLOYER ARE ELIGIBLE FOR MEMBERSHIP, GIVE THE ADDRESS OF EACH SUCH PLANT OR OFFICE.

9. IF YOU ARE CLAIMING EXEMPTION AS AN ORGANIZATION DESCRIBED IN SECTION 501 (c) (6), DO YOU PERFORM OR DO YOU PLAN TO PERFORM PARTICULAR SERVICES FOR MEMBERS, SHAREHOLDERS, OR OTHERS, SUCH AS FURNISHING CREDIT REPORTS, COLLECTING ACCOUNTS, INSPECTING PRODUCTS, CONDUCTING ADVERTISING, PURCHASING MERCHANDISE, OR OTHER SIMILAR UNDERTAKINGS? ☐ Yes ☒ No
If "Yes," ATTACH A STATEMENT IN DETAIL, INCLUDING INCOME REALIZED AND EXPENSES INCURRED, REGARDING SUCH ACTIVITIES. IF ENGAGED IN ADVERTISING, ATTACH SPECIMEN COPIES OF MATERIAL.

10a. IF YOU ARE CLAIMING EXEMPTION AS A FRATERNAL BENEFICIARY SOCIETY, ETC., AS DESCRIBED IN SECTION 501(c)(8), STATE WHETHER THE ORGANIZATION OPERATES OR PLANS TO OPERATE UNDER THE LODGE SYSTEM OR FOR THE EXCLUSIVE BENEFIT OF THE MEMBERS OF AN ORGANIZATION SO OPERATING. (Operating under the lodge system means carrying on activities under a form of organization that comprises local branches, chartered by a parent organization and largely self-governing, called lodges, chapters, or the like.)

b. IN THE CASE OF A SUBORDINATE OR LOCAL LODGE, ETC., ATTACH A CERTIFICATE SIGNED BY THE SECRETARY OF THE PARENT ORGANIZATION, UNDER THE SEAL OF THAT ORGANIZATION, CERTIFYING THAT THE SUBORDINATE LODGE IS A DULY CONSTITUTED BODY OPERATING UNDER THE JURISDICTION OF THE PARENT BODY.

c. IN THE CASE OF A PARENT OR GRAND LODGE, ATTACH A STATEMENT SHOWING (1) THE NUMBER OF SUBORDINATE LODGES IN ACTIVE OPERATION, AND (2) WHETHER PERIODICAL MEETINGS ARE ACTUALLY HELD.

d. ATTACH A STATEMENT DESCRIBING THE TYPES OF BENEFITS (LIFE, SICK, ACCIDENT, OR OTHER BENEFITS) PAID OR TO BE PAID MEMBERS.

11. YOU MUST ATTACH COPIES IN DUPLICATE OF THE FOLLOWING:

- If incorporated, a copy of your articles of incorporation, or if not incorporated, a copy of your constitution, articles of association, declaration of trust, or other document setting forth your aims and purposes. (Conformed copies must be furnished of the original document, all amendments thereto, and any changes presently proposed.)
- A copy of your bylaws or other similar code of regulations. (Conformed copies must be furnished of the original document, all amendments thereto, and any changes presently proposed.)
- A complete statement of assets and liabilities as of the end of each annual accounting period of operation (or as of the date of the filing of this application, if you were in existence for less than a year).
- A statement of receipts and expenditures for each annual accounting period of operation (or for the period for which you were in existence, if less than a year). This statement should set forth clearly the sources of receipts and purposes of expenditures. These items should include but are not limited to:
 - Where funds have been loaned or borrowed, the reason for the transaction, the security given, and interest required.
 - The extent to which the receipts or income is derived from nonmembers through ticket sales, facilities furnished, or other income producing activities.
 - Where applicant is a party to a lease, the other party being an officer, member, shareholder, or employee of the applicant or its predecessor, the amount received or paid for the lease, reasons for the transaction, and a statement as to the fair market value of the property and how that value was determined.
- A brief statement which states the specific incorporation or bylaws for this purpose.)
- A statement explaining in detail each fund-act of each fund-raising activity or business enterprise, and each business enterprise you have engaged in or plan to engage in, accompanied by copies of all agreements, if any, with other parties.
- A statement which describes in detail the nature of your activities, activities which you sponsor, and proposed activities.
- A statement which explains fully any specific activities that the organization has engaged in or sponsored and which have been discontinued. (Give dates of commencement and termination and the reasons for discontinuance.)
- A statement which describes the purposes, other than in payment for services rendered or supplies furnished, for which the organization's funds are expended or will be expended.
- A copy of each lease, if any, in which you are the lessee or lessor of property (real, personal, gas, oil, or mineral) or in which you own an interest under such lease, together with copies of all agreements with other parties for development of the property.
- A statement which clearly indicates what State statutes or court decisions govern the distribution of assets upon dissolution. (This statement may be omitted if the organization's charter, certificate, or other instrument of organization makes provision for such distribution.)
- A statement which clearly indicates what qualifications are necessary for membership in the organization. (This statement may be omitted if the charter, certificate, or other instrument of organization so provides.)

INSTRUCTIONS

A. FILING OF APPLICATION

The completed application, together with all information and data required, should be filed in duplicate with your District Director of Internal Revenue. As soon as practicable after the information and data are received, the organization will be advised of the Commissioner's determination and of the annual returns which will be required to be filed.

B. ATTACHMENTS

Every attachment should show the name and address of the organization, the date, an identifiable heading, and that it is an attachment to Form 1024.

In addition to the documents and statements listed which must be filed, any additional information citing court decisions, rulings, opinions, etc., should be filed for purposes of expediting processing of the application.

C. POWER OF ATTORNEY

If the organization expects to be represented in person or by correspondence by an agent or an attorney, a power of attorney specifically authorizing the agent or attorney to represent the organization must be filed.

D. CLAIM FOR EXEMPTION

A mere claim or contention by an organization that it is exempt from income tax under section 501 (a) of the Internal Revenue Code will not relieve the organization from filing income tax returns and paying the tax.

E. REQUESTS FOR WITHHOLDING OF INFORMATION

Any information which is submitted in the application or in support of it and which is determined by the Commissioner to relate to any trade secret, patent, process, style of work, or apparatus, may upon request be withheld from public inspection if the Commissioner determines that the disclosure of such information would adversely affect the organization. Such requests must (1) clearly identify the material to be withheld (the document, page, paragraph, and line), (2) include the reasons for the organization's position that the information is of the type which may be withheld from public inspection, and (3) be filed with the documents in which the material to be withheld is contained.

F. EMPLOYER IDENTIFICATION NUMBER

Enter your employer identification number on line 1 b. If you have no identification number, you must obtain one before filing this exemption application. To obtain one, file Form SS-4, Application for Employer Identification Number, with your District Director of Internal Revenue.

DECLARATION

Under penalties of perjury, I declare that I have examined this application, including accompanying statements, and to the best of my knowledge and belief it is true, correct, and complete.

12-29-71

Date

Hugh B. Landrum (Mk.)

Signature of officer

President

Title

NATIONAL MUFFLER DEALERS ASSOCIATION, INC.

32 EAST 57TH STREET
NEW YORK, N. Y. 10022

ELDORADO 5-2650

ATTACHMENT TO FORM 1024

11 e. Statement of purposes for which organization was formed

There are a large number of franchised Midas Muffler dealers in the U.S. Many common purposes exist and exchange of information among dealers and communication from the dealers as a body to the parent organization, the franchisor, will promote the business of the dealers.

11 f. Not applicable

11 g. Statement of nature of activities

The Association issues a regular Newsletter to its members. It has received inquiries from the members concerning various problems and has communicated with the franchisor with respect to some of these problems. The Association has engaged counsel and requested counsel to make a study of the law as it applies to franchise operations so that the members may be better informed as to their legal rights and obligations.

11 h. None

11 i. The organization's funds are expended and will be expended only in payment of services rendered or supplies furnished.

11 j. Not applicable

11 k. Section 1005 Not-For-Profit Corporation Law of the State of New York.

11 l. See By-Laws attached

A-165
PLAINTIFF'S EXHIBIT 2 - DENIAL OF EXEMPTION

Address any reply to: P.O. Box 3100 Church St. Sta., New York, N.Y. 10008

Department of the Treasury

District Director
Internal Revenue Service

Date:

In reply refer to:

March 28, 1972
M-72-EQ-620

AU:F:613:LB
264-1870

▷ National Muffler Dealers Association,
Inc.
32 East 57th Street
New York, New York 10022

Gentlemen:

We have considered your application Form 1024 under section 501(c)(6) of the Internal Revenue Code of 1954 as a business league.

This section would not apply to an organization that is not industry wide. As your association is organized and operated for the benefit of the Midas organization, you fall beyond the scope of section 501(c)(6).. Accordingly, you fail to qualify for exemption thereunder and are reminded of your liability to file Federal income tax returns on Form 1120.

When necessary corrective action is taken, we will reconsider your application.

If you do not agree with this determination, you may within thirty days of the date of this letter file a written protest in accordance with the enclosed instructions. If we do not hear from you within thirty days, this ruling will become your final determination.

Very truly yours,

Albert H. Gray

District Director

Enclosure:

Instructions for filing of a
protest (Form 716)

PLAINTIFF'S EXHIBIT 3 - DENIAL OF EXEMPTION AFTER
PROTEST

Address any reply to: P.O. Box 3111, New York, N.Y. 10008
Department of the Treasury

District Director
Internal Revenue Service

Date: June 18, 1974 In reply refer to: AU:F:610:Deyl
Tel: 264-1870

National Muffler Dealer Association, Inc.
32 East 57th Street
New York, New York 10022

Gentlemen:

In a letter dated March 28, 1972 this office denied your application, Form 1023, for exemption from Federal income tax under section 501(c)(6) of the Internal Revenue Code.

A District Conference was held October 4, 1972, regarding this denial.

Subsequently, your case was transmitted to our National Office for Technical Advice.

As a result of this Technical Advice, our position as expressed in our March 28, 1972 letter was sustained.

Accordingly, it is held that you are not exempt from Federal income tax under Section 501(c)(6) of the Code.

You are reminded of your liability to file Forms 1120.

Very truly yours,

May R. Smith

act Group Manager, Exempt Organizations

BEST COPY AVAILABLE

PLAINTIFF'S EXHIBIT 4 - APPLICATIONS FOR REFUNDS
(1971-1973)

PX 4

September 24, 1974

Internal Revenue Service
1040 Waverly Avenue
Holtsville, New York

Re: National Muffler Dealers Association
Application for Refund

Gentlemen:

On behalf of National Muffler Dealers Association, Inc., I enclose refund claims (Form 843) for tax paid for the years 1971, 1972 and 1973. The Association maintains that it was improperly denied exempt status as a business league pursuant to Section 501(c)(6) of the Internal Revenue Code.

An executed power of attorney is annexed to the claim for 1971 and true copies thereof annexed to the other two claims.

Thank you for your consideration.

Very truly yours,

MONTE ENGLER

ME:dh
Enclosures

Department of the Treasury
Internal Revenue Service

The Internal Revenue Service will indicate in the block below the kind of claim filed, and fill in, where required.

- ☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
☐ Abatement of Tax Assessed (not applicable to income, estate or gift taxes).

Name of taxpayer or purchaser of stamps
NATIONAL MUFFLER DEALERS ASSOCIATION, INC.
 Number and street
32 East 57th Street, 9th Floor
 City or town, State, and ZIP code
New York, N.Y. 10022

Fill in applicable items—Use attachments if necessary

a. Your social security number
 b. Employer identification number (if any)
23-7118946

c. Internal Revenue Service office where return (if any) was filed

HOLTSVILLE, N.Y.

d. Name and address shown on return, if different from above

same

e. Period—if for tax reported on annual basis, prepare separate form for each taxable year
 From **December 1, 1971** to **November 30, 1972**
 f. Kind of tax
corporate income

g. Amount of assessment
\$ 1,431.00Dates of payment
July 22, 1974h. Date stamps were purchased from Government
N/Ai. Amount to be refunded (if income tax, complete computation below)
\$ 1,431.00j. Amount to be abated (not applicable to income, estate, or gift taxes)
\$ --

k. The claimant believes that this claim should be allowed for the following reasons:

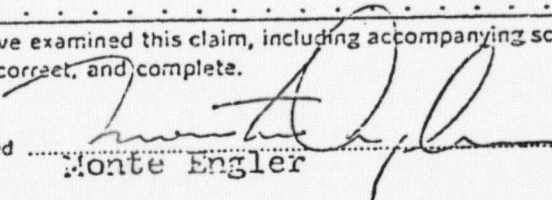
Application for erroneous denial of Exemption as a Business League. See paragraph K of claimant's claim for period from 1/29/70 to 11/30/71 submitted simultaneously herewith.

Computation of Income Tax Refund

Income Tax

1 Tax withheld	
2 Estimated tax paid	
3 Tax paid with original return	\$1,431.00
4 Any additional income tax paid	
5 Total tax paid (add lines 1-4)	\$1,431.00
6 Less: Your computation of correct tax	-0-
7 Amount of overpayment	\$1,431.00
8 Amount previously refunded	-0-
9 Net overpayment (enter in item i above)	1,431.00

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Signed 
Monte EnglerDated **September 19, 1974**

A-169
Claim

The Internal Revenue Service will indicate in the block below the kind of claim filed, and fill in, where required.

- ☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
☐ Abatement of Tax Assessed (not applicable to income, estate or gift taxes).

Name of taxpayer or purchaser of stamps
NATIONAL MUFFLER DEALERS ASSOCIATION, INC.
Number and street
32 East 57th Street, 9th Floor
City or town, State, and ZIP code
New York, N.Y. 10022

Fill in applicable items—Use attachments if necessary

a. Your social security number
b. Employer identification number (if any)
23-7118946

c. Internal Revenue Service office where return (if any) was filed
HOLTSVILLE, N.Y.

d. Name and address shown on return, if different from above
same

e. Period—if for tax reported on annual basis, prepare separate form for each taxable year
From **December 1, 1972** to **November 30, 1973**
f. Kind of tax
corporate income

g. Amount of assessment
\$ 2,689.00
Dates of payment
July 22, 1974

h. Date stamps were purchased from Government
N/A
i. Amount to be refunded (if income tax, complete computation below)
\$ 2,689.00
j. Amount to be abated (not applicable to income, estate, or gift taxes)
\$ --

k. The claimant believes that this claim should be allowed for the following reasons:

Application for erroneous denial of Exemption as a Business League. See paragraph K of claimant's claim for period from 1/29/70 to 11/30/71 submitted simultaneously herewith.

Computation of Income Tax Refund

Income Tax

1 Tax withheld	
2 Estimated tax paid	\$2,689.00
3 Tax paid with original return	
4 Any additional income tax paid	\$2,689.00
5 Total tax paid (add lines 1-4)	-0-
6 Less: Your computation of correct tax	\$2,689.00
7 Amount of overpayment	-0-
8 Amount previously refunded	\$2,689.00
9 Net overpayment (enter in item i above)	

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Signed **Monte Engler**

Dated **September 19, 1974**

Director's Stamp
(Date received)

☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
☐ Abatement of Tax Assessed (not applicable to income, estate or gift taxes).

Fill in applicable items—Use attachments if necessary

Form 843 (Rev. 1-77)

NATIONAL MUFFLER DEALERS ASSOCIATION, INC.
32 East 57th Street, 9th Floor
New York, N.Y. 10022

Employer Identification No.: 23-7118946

RIDER ANNEXED TO ITEM K, IRS FORM 843 - CLAIM

On June 18, 1974, the Internal Revenue Service (IRS) denied claimant's application for exemption from tax as a business league (IRC, Section 501(c)(6)). (Notice of Denial annexed as Exhibit A.) Claimant urges that such denial was in error and that it has no tax liability. The payment for which refund is sought was made by claimant under protest (See forwarding letter of Myron P. Gordon, Exhibit B).

The initial denial of the application was based upon the premise that the "...association is organized and operated for the benefit of the Midas organization." (See Exhibit C). It was subsequently clarified, however, that the Association was formed not for the benefit of the Midas organization but, on the contrary, for the benefit of Midas franchisees throughout the country who were faced with common problems with regard to both the marketplace and their relationship with the franchisor.

In an attempt to comport with the remaining objection of the IRS (i.e., that membership was limited only to franchisees of the Midas chain) and at the explicit suggestion of the IRS agent with whom a conference was had on this matter, the Association's by-laws were amended to expand eligibility for membership. (See November 1, 1972 letter to IRS, annexed as Exhibit D). Nonetheless, the application was denied^{1/}.

In support of the present claim, claimant relies upon the position expressed in its protest letter of June 23, 1972 which is respectfully incorporated herein (Exhibit E). We urge that the suggested amendment of the by-laws remedied the only possible basis for denying the application^{2/} and, indeed, note that the Technical Advice received by the District Director after the conference in Washington paid no heed whatsoever to the amendment.

-2-

^{1/} After denial by the district office, a conference was had in the National Office on February 14, 1973.

^{2/} Despite the fact that the amendment was made, the Association believes that limiting membership to Midas franchisees did not disqualify it from entitlement to the exemption. The case of Pepsi-Cola Bottlers' Association v. U.S., 369 F. 2d 250 (7th Cir. 1966), cited in our protest letter (Exhibit E) mandates such a conclusion.

In sum, claimant urges that it is entitled to exemption from tax as a business league pursuant to Section 501(c)(6) of the Internal Revenue Code. Tax paid as a result of the improper denial of such status should be refunded.

LAW OFFICES
GORDON, FRUTKIN & RABIN

32 EAST 57TH STREET
NEW YORK, N. Y. 10022
ELDORADO 5-2650

MYRON P. GORDON
LEONARD B. FRUTKIN
JACK RABIN
MONTE ENGLER

July 22, 1974

Internal Revenue Service Center
1040 Waverly Ave.
Holtsville, N.Y.

Gentlemen:

Some time ago this organization applied for an exemption from Federal income taxes under Section 501 (c) (6) of the Internal Revenue Code. By letter dated June 18, 1974, copy of which is enclosed, that application was denied.

Accordingly, we are enclosing herewith Forms 1120 for the fiscal years ending November 30, 1971, 1972 and 1973, together with checks in the sum of \$1,237.00, \$1,431.00 and \$2,689.00 in payment for the taxes shown to be due. Please note, however, that these Returns are being filed and payments are being made under protest and that we intend to start an action to recover the amount of these payments.

The reason for the late filing of these Returns is that we were just notified of the denial of the exemption.

Very truly yours,

MYRON P. GORDON

MPG:MG

Encls.

BEST COPY AVAILABLE

NATIONAL MUFFLER DEALERS ASSOCIATION, INC.

32 EAST 57TH STREET
NEW YORK, N. Y. 10022

ELDORADO 5-2650

June 23, 1972

Internal Revenue Service
Box 3100
Church Street Station
New York, N.Y. 10008

Re: AU:F:613:LB
National Muffler Dealers Association

Gentlemen:

This is to protest your determination, on March 28, 1972, that National Muffler Dealers Association, Inc. fails to qualify for the business league exemption granted by section 501(c)(6) of the Internal Revenue Code. Pursuant to previous correspondence with your office, time to protest was extended to June 30, 1972.

The determination letter reflects a belief that the Association "...is organized and operated for the benefit of the Midas organization." As indicated in the April 12, 1972 letter of our counsel to Mr. Beyl of your office, a copy of which is attached hereto, such a conclusion is not valid. Please note the attachments to that letter, reflecting that the Association is in no manner connected with the Midas Muffler organization and, indeed, pursues goals which are frequently the antithesis of those desired by Midas.

The criteria for determining whether an organization properly qualifies for the business league exemption have been long established and judicially recognized. In order to qualify for the exemption an organization must comply with the following:

- (1) It must be a business league;
- (2) it must not be organized for profit;
- (3) it must be an organization no part of the net earnings of which inures to the benefit of any private shareholder or individual;
- (4) it must be an association of persons, incorporated or unincorporated, having common business interests the purpose of which is to promote those common interests;
- (5) its activities must be directed at improving the business conditions of one or more

lines of business and not particular services for individual persons, and (6) it may not engage in a business ordinarily carried on by businesses for profit.

U. S. v. Oklahoma City Retailers Association,
331 F. 2d 328, 330-1(10th Cir. 1964). See also,
American Plywood Association v. U.S., 267 F. Supp.
830, 832 (D.C. 1967).

It is respectfully submitted that the National Muffler Dealers Association, Inc. meets all of the above criteria.

No elaboration is required concerning items 2, 3, 4 and 6. It is a matter of record, subject to little interpretation, that the Association is not organized for profit, that it permits no part of its net earnings to inure to the benefit of any individual (there are no shareholders), that it is comprised of parties having common business interests who seek to promote those interests and that it does not engage in a business ordinarily carried on by other businesses for profit. I address my attention at this point to items 1 and 5, two criteria which are inextricably related.

Treasury Regulation, 1.501(c)(6)-1, deemed now to have the force of law [See, American Plywood Ass'n. v. U. S., supra, and cases cited therein], defines "business league" as follows:

[A]n association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus, its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons.

The opening article of the by-laws of the Association, submitted with the initial exemption application, makes it clear that it is the type of organization contemplated:

The purposes of this Association are to foster and promote the interests of those individuals, partnerships and corporations who are engaged

in business as muffler dealers and installers and related activities, to promote cooperation and mutual interest among its members, to advance the trade and commerce of its members, to encourage the exchange of ideas among its members for the common good and welfare, to secure, classify and disseminate to its members all information essential or helpful in the conduct of their businesses.

The Association shall do anything necessary and proper for the accomplishment of any of the foregoing purposes which may be recognized as a proper and lawful objective of trade associations, all of which shall be consistent with the public interest, as well as in the interests of the members.

That membership has been thus far limited to dealers having a Midas franchise does not alter the broad based purposes of the Association to improve the industry. The name "Midas" is virtually synonymous with "muffler dealers" throughout the country and accomplishments achieved by Midas dealers in accordance with the stated purposes of the Association inevitably redound to the benefit of the industry in general and to the public, as a whole.

It is significant, for example, that Midas dealers need not, and quite frequently do not, purchase their supplies and stock in trade from the Midas organization. Information disseminated by the Association is often influential in assisting members to decide the best and least expensive products to buy. Thus, competition between suppliers to the industry is encouraged and the resultant benefits flow to all muffler dealers and to the public. Clearly it is specious to argue that the Association is "organized and operated for the benefit of the Midas organization."

It must be recognized, however, that Midas franchisees do have certain problems that are not shared by other muffler dealers, notably those that exist as a result of the unique relationship between franchisor and franchisee. This country is witnessing a franchising revolution which is having an obvious impact upon the public and the marketplace. It is in the public

interest to have franchisees band together to address their common problems without imposing upon them the artificial and illogical necessity of inviting the participation of parties who share only some of those problems. For example, the problems of members of the New York City Chamber of Commerce are largely different than those of members of the Poughkeepsie Chamber of Commerce. Clearly, though, neither body would be denied the Section 501(c)(6) exemption because members of the other, who do share many common problems, were excluded from membership. The totality of their problems is that which binds them together. The different problems faced by chambers of commerce are created essentially by location. The different problems faced by Midas franchisees are merely caused by a different factor, i.e., their distinct relationship with a franchisor.

The Association here is no more organized for the benefit of the Midas organization than was the plaintiff association in the case of Pepsi-Cola Bottlers' Association, Inc. v. United States, 369 F. 2d 250 (7th Cir. 1966) organized for the benefit of the Pepsi-Cola Company. In that case, despite the fact that its members all bottled the same product, the court affirmed the exemption granted by the district court, stating, "The plaintiff Association cannot be disqualified merely because its members all bottle a particular soft drink product. It is unreasonable to write into the statute and regulations a limitation wholly unsupported by the legislative history." 369 F. 2d at 252.

It is respectfully submitted that the Pepsi-Cola decision is the correct interpretation of Congressional intent and should be dispositive of this case. In light of the Service's subsequent expression that it would deny exemption to organizations promoting a single brand or product within a line of business, however, I wish to re-emphasize the fact that Midas franchisees need not, and do not, deal solely in Midas products. The Association is, therefore, organized for the benefit of the Midas organization to an even lesser extent than was the Pepsi-Cola Bottlers' Association organized for the benefit of Pepsi. It is noted, moreover, that in a manner similar to the petitioning Association herein, the Pepsi bottlers organized "...to solve certain problems common to Pepsi-Cola bottlers some of whom felt that the Pepsi-Cola Company took no interest in their problems." 369 F. 2d at 251.

Certainly it is true that members of the Association, as well as the industry and the public, feel that they are benefited by membership. This, however, is not to be considered as militating against the exemption. As the District Court stated in granting an exemption in Omaha Live Stock Traders Exchange v. U.S., 244 F. Supp. 384, 387 (Neb. 1965), "Human experience has taught us that few men would join an organization if they did not derive at least some benefit out of it."

In short, it is submitted that the petitioner satisfies all the criteria requisite to the exemption sought and that no valid reason exists for such exemption to be denied.

I make the above statement upon my personal knowledge as President of National Muffler Dealers Association, Inc. and swear that the facts stated therein are true, to the best of my knowledge and belief.

I respectfully request a district office conference to discuss the exemption application.

Sworn to before me this
23 day of June 1972.

Hugh Landrum

Notary Public

MONTE FUCHER
NOTARY PUBLIC, State of New York
No. 123456
Qualified in New York County
Commission Expires March 30, 1973

This statement was prepared by the undersigned as a member of the law firm representing the petitioning Association. Based upon my own personal knowledge and belief, the facts stated herein are true.

Myron P. Gordon

BEST COPY AVAILABLE

FORM 2848

(Rev. September 1967)

U.S. Treasury Department
Internal Revenue Service**Power of Attorney**

(See Separate Instructions)

Name, address including ZIP code, and identifying number of taxpayer(s)
NATIONAL MUFFLER DEALERS ASSOCIATION, INC.
 32 East 57th Street, 9th Floor
 New York, N.Y. 10022

237 118 946

hereby appoints (name, address including ZIP code, and telephone number of appointee(s))

- (1) **MYRON P. GORDON** (212) 355-2650
 32 East 57th Street
 New York, N.Y. 10022
- (2) **JACK RABIN** (212) 355-2650
 32 East 57th Street
 New York, N.Y. 10022
- (3) **MONTE ENGLER** (212) 355-2650
 32 East 57th Street
 New York, N.Y. 10022

as attorney(s)-in-fact to represent the taxpayer(s) before any office of the Internal Revenue Service with respect to (specify Internal Revenue tax matters and years or periods):

Taxpayer's Application for Exemption as Business League - AU:F:613:LB

Said attorney(s)-in-fact (or either of them) shall, subject to revocation, have authority to receive confidential information and full power to perform on behalf of the taxpayer(s) the following acts with respect to the above tax matters:

(Strike through any of the following which are not granted.)

To receive, but not to endorse and collect, checks in payment of any refund of Internal Revenue taxes, penalties, or interest.

To execute waivers (including offers of waivers) of restrictions on assessment or collection of deficiencies in tax and waivers of notice of disallowance of a claim for credit or refund.

To execute consents extending the statutory period for assessment or collection of taxes.

To execute closing agreements under section 7121 of the Internal Revenue Code.

To delegate authority or to substitute another representative.

Other acts (specify) to conduct on behalf of taxpayer any and all negotiations relative to the above tax matter.

Copies of notices and other written communications addressed to the taxpayer(s) in proceedings involving the above matters should be sent to (Name, address including ZIP code, and telephone number):

MONTE ENGLER, c/o Gordon, Frutkin & Rabin, 32 East 57th Street, N.Y., N.Y. 10022

and

HUGH LANDRUM, c/o Midas Muffler Shop, P.O. Box 526, Columbus, Georgia 31902

This power of attorney revokes all prior powers of attorney and tax information authorizations on file with the same Internal Revenue office with respect to the same matters and years or periods covered by this instrument, except the following:

(Specify to whom granted, date, and address including ZIP code, or refer to attached copies of prior powers and authorizations)

Signature of or for taxpayer(s)

If signed by a corporate officer, partner, or fiduciary on behalf of the taxpayer, I certify that I have the authority to execute this power of attorney on behalf of the taxpayer.

Hugh Landrum
 (Signature)
Hugh Landrum

President
 (Title, if applicable)

April 26, 1972
 (Date)

(Signature)

(Title, if applicable)

(Date)

I am a member in good standing of the bar of the highest court of the jurisdiction indicated below; or
I am duly qualified to practice as a certified public accountant in the jurisdiction indicated below; or
I am enrolled as an agent pursuant to the requirements of Treasury Department Circular No. 230.

[illegible]

The person(s) signing as or for the taxpayer(s): (Check and complete one.)

(Signature of Witness) _____ (Date) _____

(Signature of Witness) _____ (Date) _____

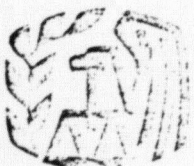
(Signature of Notary)

(Date)

NOTARIAL SEAL
(if required)

PLAINTIFF'S EXHIBIT 5 - DENIAL OF REFUND APPLICATION
(1972)

PX-5



Department of the Treasury

Internal Revenue Service

P.O. BOX 700
HOLTSVILLE, NY 11742
TELEPHONE (516) 654-6111

Date MAY. 24, 1975 In reply refer to 19741535
C105- 6 3502

NATIONAL MUFFLER DEALERS
ASSOCIATION INC
32 E 57TH ST
NEW YORK, NY 10022

CERTIFIED MAIL - No. 634883

Employer Identification Number: 23-7118946
Document Locator Number: 13347-313-61663-4
Kind of Tax: Corporation

Dear Sirs:

We are sorry, but we cannot allow your claim, which we received Sep. 25, 1974, for an adjustment in the amount of \$1,431.00 to your tax for the period ended Nov. 30, 1972. This letter is your final notice that your claim is fully disallowed.

We have disallowed the claim because as a result of a District Conference held October 4, 1972 and the decision of the National Office, it is held that you are not exempt from Federal Income Tax under Section 501(c)(6) of the Code.

If you wish to bring suit or proceedings for the recovery of any tax, penalties, or other moneys for which this disallowance notice is issued, you may do so by filing such a suit with the United States District Court having jurisdiction or the United States Court of Claims, 717 Madison Place, N.W., Washington, D.C., 20005. The law permits you to do this within 2 years from the mailing date of this letter. Suit may not be filed in the United States Tax Court.

If you need to call us, please ask for Dennis Mitchell at the number shown above.

Sincerely yours,

Henry P. Siefert
Director

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A-183

PLAINTIFF'S EXHIBIT 6 - PLAINTIFF'S BY-LAWS (APRIL,
1971)

PX-6

BY-LAWS

of

NATIONAL MUFFLER DEALERS ASSOCIATION, INC.

April, 1971

BY-LAWS OF NATIONAL MUFFLER DEALERS ASSOCIATION, INC.

ARTICLE I - PURPOSES

The purposes of this Association are to foster and promote the interests of those individuals, partnerships and corporations who are engaged in business as muffler dealers and installers and related activities, to promote cooperation and mutual interest among its members, to advance the trade and commerce of its members, to encourage the exchange of ideas among its members for their common good and welfare, to secure, classify and disseminate to its members all information essential or helpful in the conduct of their businesses.

The Association shall do anything necessary and proper for the accomplishment of any of the foregoing purposes or any other purpose which may be recognized as a proper and lawful objective of trade associations, all of which shall be consistent with the public interest, as well as in the interests of the members.

ARTICLE II - MEMBERSHIP

Section 1 - Eligibility for Membership

(a) Any muffler dealer holding a valid Midas Muffler franchise shall be eligible for membership.

(b) All shops under common ownership, management or control must be enrolled as members.

Section 2 - Applications For Membership

Applications for membership shall be submitted on

standard forms prepared under the direction of the Board of Directors and shall be accompanied by an enrollment fee fixed by the Board of Directors.

All dealers who are engaged in business as such dealers as of March 1, 1971 and who apply to join the Association after January 1, 1972 shall be required to pay an enrollment fee equal to the total of all dues and assessments payable by members from March 1, 1971. Any dealer who first commences doing business after March 1, 1971 shall, if he joins the Association within twelve (12) months from the date of the commencement of doing business, be required to pay dues only from the date of his application. If, however, such dealer applies to join the Association more than twelve (12) months from the date of commencement of doing business, then he shall pay an enrollment fee equal to all dues and assessments payable by members from the date of the commencement of doing business.

Section 3 - Suspension and Cancellation of Membership

(a) The membership privileges of any member of the Association shall automatically be suspended upon failure of the member to pay any applicable dues or assessments to the Association within a period of sixty (60) days following the date on which such dues or assessments are payable. Immediately upon such suspension, the suspended member shall be notified of the fact of suspension and the amount of the delinquency. In the event that within thirty (30) days from the date of said notice all delinquencies in the account of such suspended member are not cured, such membership shall, upon the expiration of such thirty (30) days' period, automatically be canceled,

provided that the Board of Directors may, at any time prior to the expiration of said thirty (30) days' period, for reasons which in its opinion justifies special consideration, defer such cancellation for such period of time as it deems warranted. In the event that a member has had its membership canceled for non-payment of dues or assessments, then such member shall not be readmitted to membership unless all amounts previously due shall be paid, together with all regular dues and assessments which may have come due during the period the member was not in good standing.

(b) Membership privileges of any member shall automatically be canceled in the event that such member no longer retains a valid Midas franchise; except that if such member's franchise has been canceled and the member is contesting such cancellation, he may continue to retain his membership until the final determination of such contest.

(c) A member may resign at any time; however, any such member requesting readmission to membership in the Association shall not be readmitted to membership unless all dues and assessments coming due during the period when he was not a member shall have been paid.

Section 4 - Voting Rights

(a) In voting for the election of members of the Board of Directors each member shall be entitled to one vote, regardless of the number of shops under the common ownership, management or control of such member.

(b) In all other cases where a membership vote is taken, voting shall be on the basis of one vote per member shop.

ARTICLE III - MEETINGS OF MEMBERS

Section 1 - Annual Meeting

The Annual Meeting of the Association shall be held at such time and place as the Board of Directors may designate.

Section 2 - Special Meetings

Special Meetings may be called by the President at the written request of at least four (4) Directors, and shall be called by the President at the written request of at least twenty-five (25) members.

Section 3 - Notices of Meeting

Notices of all Annual meetings shall be mailed to all members at least thirty (30) days in advance of the date of the meeting. Notices of all Special meetings shall be mailed at least ten (10) days in advance of the date of the meeting. The notice shall specify the date and place of the meeting and the purpose or purposes thereof, to the extent known.

Section 4 - Quorum

At all meetings of members, Special or Annual, the presence of at least twenty-five (25%) per cent of the total number of shops in the Association, whether in person or by proxy, shall constitute a quorum.

Section 5 - Voting by Mail

At any time, the Board of Directors may authorize the submission to the membership by mail ballot of any question

determined by the Directors to be submitted. Such submission and any and all other matters which under these By-Laws may or shall be determined by a mail vote shall be submitted in the following manner:

There shall be mailed to each voting member a ballot upon which each member shall record his or its vote and return it to the office of the Association. On the thirtieth (30th) day following the date of mailing of the ballots, a count shall be made of the votes cast and any ballots not received by said date shall not be counted. Unless at least twenty-five (25%) per cent of the member shops of the Association return their ballots within the aforesaid time period, none of the ballots shall be considered. A majority of the valid ballots submitted shall be necessary for the determination of any question.

Section 6 - Sectional or Regional Meetings

In addition to the Annual and Special Meetings of the members hereinabove provided for, Sectional or Regional Meetings may be called, from time to time, by the Board of Directors.

ARTICLE IV - DIRECTORS

Section 1

The management of the operations and the affairs of the Association shall be vested in a Board of Directors elected from the membership as provided herein. The duties of Directors shall include, but not be limited to, the administration of all Association funds, the management and disposition

of Association property, the formulation of policies of the Association, the determination of disputes in connection with balloting, the determination of the fiscal year of the Association, the election of officers, the recommendation of enrollment fees, dues and assessments, and such other duties as are herein prescribed.

Section 2 - Number and Qualifications of Directors

For the purposes of determining the number of Directors, the country shall be divided into five (5) Regional Territories. Said five (5) Regional Territories shall be designated as, and consist of, the areas hereinbelow provided:

WESTERN REGION

Arizona	Nevada
California	New Mexico
Colorado	Oregon
Hawaii	Utah
Idaho	Washington
Montana	Wyoming
	Alaska

MIDWESTERN REGION

Illinois	Missouri
Indiana	Nebraska
Iowa	North Dakota
Kansas	South Dakota
Michigan	Wisconsin
Minnesota	

SOUTHERN REGION

Alabama	Mississippi
Arkansas	Oklahoma
Florida	Puerto Rico
Louisiana	Texas
	Virgin Islands

SOUTH - CENTRAL REGION

Georgia	South Carolina
Kentucky	Tennessee
Maryland	Virginia
North Carolina	West Virginia
Ohio	Washington, D.C.

NORTHEASTERN REGION

Connecticut
Maine
Massachusetts
New Hampshire
New Jersey

New York
Pennsylvania
Rhode Island
Vermont
Delaware

For each full twenty (20) shops in any Regional Territory, the members in that Regional Territory shall be entitled to elect one (1) Director. If, however, there are fewer than twenty (20) shops enrolled as members in any Regional Territory, then the members in that Territory shall nevertheless be entitled to elect one (1) Director, provided that at least five (5) shops in such Territory are enrolled as members.

Section 3 - Term of Office

Upon the election of the first Board of Directors of the Association, one-third (1/3rd) of their number shall be designated to serve for three (3) years, one-third (1/3rd) for two (2) years, and one-third (1/3rd) for one (1) year, such determination to be made by the drawing of lots. Thereafter, as the term of each Director expires, his successor shall be elected for a term of three (3) years.

After a Director has served a full three (3) year term, then he shall not be eligible for re-election to the Board of Directors until the annual election of Directors next succeeding the election for which his successor shall have been elected.

Section 4 - Election by Mail Ballot - Nominating Committee

The President shall appoint a Nominating Committee of five (5) members at least one hundred and eighty (180) days

prior to the date of the Annual Meeting. The Nominating Committee shall nominate one (1) candidate for each vacancy to be filled and shall forward its slate of nominees to the office of the Association at least one hundred and twenty (120) days in advance of the Annual Meeting. The report of the Nominating Committee shall be forwarded to all members. Members may thereafter, but not less than ninety (90) days in advance of the Annual Meeting, make additional nominations of members in their own Regional Territories, provided such nominations are made by not less than five (5) members in that Regional Territory.

Promptly upon expiration of the period for submitting additional nominations, there shall be forwarded, by mail, appropriate ballots to all members in good standing. All ballots must be returned to the office of the Association not later than ten (10) days prior to the Annual Meeting in order to be eligible to be counted. Such ballots shall be retained unopened until the date of the Annual Meeting, at which time they will be handed to tellers duly appointed for the purpose of counting the same. The candidates receiving the greatest number of votes shall be declared duly elected for the offices to be filled. In the case of a tie vote, another ballot shall be taken at the Annual Meeting and all members in good standing from the Regional Territory in which there is a tie vote shall be eligible to cast a ballot in order to break the tie, which ballot shall determine the election without recourse to a further mail vote.

Section 5 - Filling of Vacancies

Whenever any vacancy shall occur on the Board of

Directors by death, resignation or otherwise, the same shall be filled temporarily by a majority vote of the remaining members of the Board from among the members in the voting group represented by the Director whose office became vacant. At the next Annual Meeting of the Association, the vacancy shall be filled and the person so chosen shall hold office for the remainder of the term of the Director whose office became vacant.

Section 6 - Meetings - Quorum

Meetings of the Board of Directors shall be held at the times and places as determined by the Board of Directors. In addition, meetings of the Board may be held on call of the President or at the written request of four (4) Directors. The presence of a majority of the Board of Directors shall be required for a quorum. Notice of all meetings of Directors shall be mailed to each Director at least ten (10) days in advance of the date of meeting, except that in the event of an emergency, Special Meetings may be held on two (2) days' notice by telegram or telephone.

Section 7 - Expenses of Directors - Reimbursement

Each Director shall be reimbursed a Tourist Class (if available) common carrier fare for his travel to and from Board Meetings attended by him during his term of office plus the cost of his hotel room.

Section 8 - Executive Committee

The Board of Directors shall select an Executive Committee, consisting of not less than five (5) members of the Board, who shall have all of the powers of the Board of Directors

between meetings of the Board. However, any action of the Executive Committee shall immediately be submitted for ratification to the entire Board of Directors by mail ballot.

ARTICLE V - OFFICERS

Section 1 - Number

The officers of the Association shall be a President, First Vice-President, Second Vice-President, Secretary and Treasurer, all of whom shall serve without compensation.

Section 2 - How Elected

At its first meeting immediately following the Annual Meeting, the Directors shall elect all of the officers from the membership of the Board of Directors.

Section 3 - Executive Director

The Board of Directors, at its discretion, may employ an Executive Director and/or other staff assistants and counsel, as the affairs of the Association may require.

Section 4 - Compensation

The Executive Director, staff members and counsel may receive such compensation as the Board of Directors may authorize. Officers shall be reimbursed for all expenses incurred by them in connection with the carrying out of their duties.

Section 5 - Disbursement of Funds

All checks drawn on the Association bank accounts must be signed by at least two (2) of the Officers and Executive Director. However, an operating account may be established on which only one of the designated signatures is necessary, and

the Board of Directors may require, in its discretion, that the signatory to such account be bonded, in which event the amount in the operating account shall not at any time exceed the amount of the bond.

ARTICLE VI - DUTIES OF OFFICERS

Section 1 - President

The President shall preside at all meetings of the Board of Directors and at all meetings of the Association. He shall appoint all committees and perform such other duties and functions as custom and parliamentary usage require.

Section 2 - First Vice-President

The First Vice-President shall assume the duties of the President at the latter's request, or in his absence.

Section 3 - Second Vice-President

The Second Vice-President shall assume the duties of the President, if the President so requests it or in the event of his absence, provided that the First Vice-President is absent or incapacitated, and in those cases where the First Vice-President has assumed the duties of the President.

Section 4 - Secretary

The Secretary shall record the Minutes of all meetings of the Association and of the Board of Directors, receive and care for all records, papers and other documents belonging to the Association, and he shall perform all other duties or functions that usually pertain to that position.

Section 5 - Treasurer

The Treasurer shall receive and properly account for all funds of the Association, keep proper records of all receipts and expenditures, and render a complete financial report at the Annual Meeting and at such other times as may be requested by the Board of Directors; he shall deposit all funds of the Association in a checking account or accounts in the name of the Association; he shall pay all bills and other obligations incurred by the Association. He may be required, at the discretion of the Board of Directors, to give bond in such amount as may be directed, the cost of which shall be paid by the Association.

ARTICLE VII - COMMITTEES

All Committees, except those herein specifically provided for, shall be appointed by the President to perform any duties which may be required.

ARTICLE VIII - DUES AND ASSESSMENTS

Section 1

Monthly dues for membership in the Association shall consist of the sum of Ten Dollars (\$10.00) per month per shop, payable quarterly in advance.

Section 2

Any and all changes in the dues schedule or any assessments shall be made by the Board of Directors.

ARTICLE IX - AMENDMENTS

The By-Laws of this Association may be amended by a majority vote of the members in good standing. Proposed

amendments must be submitted to the membership in writing at least thirty (30) days in advance of the Special or Annual Meeting at which the proposed amendment will be presented. All members in good standing shall be guaranteed the opportunity to vote on all proposed amendments either by mail or at the time of the Special or Annual Meeting at which the proposed amendment will be presented.

A proposed amendment may be initiated by a majority vote of the Board of Directors or by petition signed by not less than twenty-five (25%) per cent of the member shops in any Regional Territory.

A-197

PLAINTIFF'S EXHIBIT 7 - PLAINTIFF'S BY-LAWS (JANU-
ARY, 1973)

PX-7

BY-LAWS

of

NATIONAL MUFFLER DEALERS ASSOCIATION, INC.

January, 1973

32 East 57th Street
New York, N.Y. 10022

BY-LAWS OF NATIONAL MUFFLER DEALERS ASSOCIATION, INC.

ARTICLE I - PURPOSES

The purposes of this Association are to foster and promote the interests of those individuals, partnerships and corporations who are engaged in business as muffler dealers and installers and related activities, to promote cooperation and mutual interest among its members, to advance the trade and commerce of its members, to encourage the exchange of ideas among its members for their common good and welfare, to secure, classify and disseminate to its members all information essential or helpful in the conduct of their businesses.

The Association shall do anything necessary and proper for the accomplishment of any of the foregoing purposes or any other purpose which may be recognized as a proper and lawful objective of trade associations, all of which shall be consistent with the public interest, as well as in the interests of the members.

ARTICLE II - MEMBERSHIP

Section 1 - Eligibility for Membership

(a) Any muffler dealer holding a valid franchise as such shall be eligible for membership.

(b) No member may enroll or remain as a member unless all shops under said member's ownership, management or control are all enrolled as members.

Section 2 - Applications For Membership

Applications for membership shall be submitted on standard forms prepared under the direction of the Board of Directors and shall be accompanied by an enrollment fee fixed by the Board of Directors.

All dealers who are engaged in business as such dealers as of March 1, 1971 and who apply to join the Association after January 1, 1972 shall be required to pay an enrollment fee of \$75.00 per shop. Any dealer who first commences doing business after March 1, 1971 shall, if he joins the Association within twelve (12) months from the date of the commencement of doing business, be required to pay dues only from the date of his application. If, however, such dealer applies to join the Association more than twelve (12) months from the date of commencement of doing business, then he shall pay an enrollment fee of \$75.00 per shop. The Board of Directors, however, may, at any time and from time to time, designate a period of time during which the enrollment fee may be waived.

Section 3 - Suspension and Cancellation of Membership

(a) The membership privileges of any member of the Association shall automatically be suspended upon failure of the member to pay any applicable dues or assessments to the Association

within a period of sixty (60) days following the date on which such dues or assessments are payable. Immediately upon such suspension, the suspended member shall be notified of the fact of suspension and the amount of the delinquency. In the event that within thirty (30) days from the date of said notice all delinquencies in the account of such suspended member are not cured, such membership shall, upon the expiration of such thirty (30) days' period, automatically be canceled, provided that the Board of Directors may, at any time prior to the expiration of said thirty (30) day's period, for reasons which in its opinion justifies special consideration, defer such cancellation for such period of time as it deems warranted. In the event that a member has had its membership canceled for non-payment of dues or assessments, then such member shall not be readmitted to membership unless all amounts previously due shall be paid, together with all regular dues and assessments which may have come due during the period the member was not in good standing.

(b) Membership privileges of any member shall automatically be canceled in the event that such member no longer retains a valid franchise; except that if such member's franchise has been canceled and the member is contesting such cancellation, he may continue to retain his membership until the final determination of such contest.

(c) A member may resign at any time; however, any such member requesting readmission to membership in the Association shall not be readmitted to membership unless all dues and assessments coming due during the period when he was not a member shall have been paid.

Section 4 - Voting Rights

(a) In voting for the election of members of the Board of Directors each member shall be entitled to one vote, regardless of the number of shops under the common ownership, management or control of such member.

(b) In all other cases where a membership vote is taken, voting shall be on the basis of one vote per member shop.

ARTICLE III - MEETING OF MEMBERS

Section 1 - Annual Meeting

The Annual Meeting of the Association shall be held at such time and place as the Board of Directors may designate.

Section 2 - Special Meetings

Special Meetings may be called by the President at the written request of at least four (4) Directors, and shall be called by the President at the written request of at least twenty-five (25) members.

Section 3 - Notices of Meeting

Notices of all Annual meetings shall be mailed to all members at least thirty (30) days in advance of the date of the meeting. Notices of all Special meetings shall be mailed at least ten (10) days in advance of the date of the meeting. The notice shall specify the date and place of the meeting and the purpose or purposes thereof, to the extent known.

Section 4 - Quorum

At all meetings of members, Special or Annual, the presence of at least twenty-five (25%) per cent of the total number of shops in the Association, whether in person or by proxy, shall constitute a quorum.

Section 5 - Voting by Mail

At any time, the Board of Directors may authorize the submission to the membership by mail ballot of any question determined by the Directors to be submitted. Such submission and any and all other matters which under these By-Laws may or shall be determined by a mail vote shall be submitted in the following manner:

There shall be mailed to each voting member a ballot upon which each member shall record his or its vote and return it to the office of the Association. On the thirtieth (30th) day

following the date of mailing of the ballots, a count shall be made of the votes cast and any ballots not received by said date shall not be counted. Unless at least twenty-five (25%) per cent of the member shops of the Association return their ballots within the aforesaid time period, none of the ballots shall be considered. A majority of the valid ballots submitted shall be necessary for the determination of any question.

Section 6 - Sectional or Regional Meetings

In addition to the Annual and Special Meetings of the members hereinabove provided for, Sectional or Regional Meetings may be called, from time to time, by the Board of Directors.

ARTICLE IV - DIRECTORS

Section 1

The management of the operations and the affairs of the Association shall be vested in a Board of Directors elected from the membership as provided herein. The duties of Directors shall include, but not be limited to, the administration of all Association funds, the management and disposition of Association property, the formulation of policies of the Association, the determination of disputes in connection with

balloting, the determination of the fiscal year of the Association, the election of officers, the recommendation of enrollment fees, dues and assessments, and such other duties as are herein prescribed.

Section 2 - Number and Qualifications of Directors

For the purposes of determining the number of Directors, the country shall be divided into five (5) Regional Territories. Said five (5) Regional Territories shall be designated as, and consist of, the areas hereinbelow provided:

WESTERN REGION

Arizona	Nevada
California	New Mexico
Colorado	Oregon
Hawaii	Utah
Idaho	Washington
Montana	Wyoming
	Alaska

MIDWESTERN REGION

Illinois	Missouri
Indiana	Nebraska
Iowa	North Dakota
Kansas	South Dakota
Michigan	Wisconsin
Minnesota	

SOUTHERN REGION

Alabama	Mississippi
Arkansas	Oklahoma
Florida	Puerto Rico
Louisiana	Texas
	Virgin Islands

SOUTH - CENTRAL REGION

Georgia	South Carolina
Kentucky	Tennessee
Maryland	Virginia
North Carolina	West Virginia
Ohio	Washington, D.C.

NORTHEASTERN REGION

Connecticut	New York
Maine	Pennsylvania
Massachusetts	Rhode Island
New Hampshire	Vermont
New Jersey	Delaware

For each full twenty (20) shops in any Regional Territory, the members in that Regional Territory shall be entitled to elect one (1) Director. If, however, there are fewer than twenty (20) shops enrolled as members in any Regional Territory, then the members in that Territory shall nevertheless be entitled to elect one (1) Director, provided that at least five (5) shops in such Territory are enrolled as members.

Section 3 - Term of Office

Upon the election of the first Board of Directors of the Association, one-third (1/3rd) of their number shall be designated to serve for three (3) years, one-third (1/3rd) for two (2) years, and one-third (1/3rd) for one (1) year, such determination to be made by the drawing of lots. Thereafter,

as the term of each Director expires, his successor shall be elected for a term of three (3) years.

After a Director has served a full three (3) year term, then he shall not be eligible for re-election to the Board of Directors until the annual election of Directors next succeeding the election for which his successor shall have been elected.

Section 4 - Election by Mail Ballot - Nominating Committee

The President shall appoint a Nominating Committee of five (5) members at least one hundred and eighty (180) days prior to the date of the Annual Meeting. The Nominating Committee shall nominate one (1) candidate for each vacancy to be filled and shall forward its slate of nominees to the office of the Association at least one hundred and twenty (120) days in advance of the Annual Meeting. The report of the Nominating Committee shall be forwarded to all members. Members may thereafter, but not less than ninety (90) days in advance of the Annual Meeting, make additional nominations of members in their own Regional Territories, provided such nominations are made by not less than five (5) members in that Regional Territory.

Promptly upon expiration of the period for submitting additional nominations, there shall be forwarded, by mail, appropriate ballots to all members in good standing. All ballots

must be returned to the office of the Association not later than ten (10) days prior to the Annual Meeting in order to be eligible to be counted. Such ballots shall be retained unopened until the date of the Annual Meeting, at which time they will be handed to tellers duly appointed for the purpose of counting the same. The candidates receiving the greatest number of votes shall be declared duly elected for the offices to be filled. In the case of a tie vote, another ballot shall be taken at the Annual Meeting and all members in good standing from the Regional Territory in which there is a tie vote shall be eligible to cast a ballot in order to break the tie, which ballot shall determine the election without recourse to a further mail vote.

Section 5 - Filling of Vacancies

Whenever any vacancy shall occur on the Board of Directors by death, resignation or otherwise, the same shall be filled temporarily by a majority vote of the remaining members of the Board from among the members in the voting group represented by the Director whose office became vacant. At the next Annual Meeting of the Association, the vacancy shall be filled and the person so chosen shall hold office for the remainder of the term of the Director whose office became vacant.

Section 6 - Meetings - Quorum

Meetings of the Board of Directors shall be held at the times and places as determined by the Board of Directors. In addition, meetings of the Board may be held on call of the President or at the written request of four (4) Directors. The presence of a majority of the Board of Directors shall be required for a quorum. Notice of all meetings of Directors shall be mailed to each Director at least ten (10) days in advance of the date of meeting, except that in the event of an emergency, Special Meetings may be held on two (2) day's notice by telegram or telephone.

Section 7 - Expenses of Directors - Reimbursement

Each Director shall be reimbursed a Tourist Class (if available) common carrier fare for his travel to and from Board Meetings attended by him during his term of office plus the cost of his hotel room and meals.

Section 8 - Executive Committee

The Board of Directors shall select an Executive Committee, consisting of not less than five (5) members of the Board, who shall have all of the powers of the Board of Directors between meetings of the Board. However, any action of the Executive Committee shall immediately be submitted for ratification to the entire Board of Directors by mail ballot.

ARTICLE V - OFFICERS

Section 1 - Number

The officers of the Association shall be a President, First Vice-President, Second Vice-President, Secretary and Treasurer, all of whom shall serve without compensation.

Section 2 - How Elected

At its first meeting immediately following the Annual Meeting, the Directors shall elect all of the officers from the membership of the Board of Directors.

Section 3 - Executive Director

The Board of Directors, at its discretion, may employ an Executive Director and/or other staff assistants and counsel, as the affairs of the Association may require.

Section 4 - Compensation

The Executive Director, staff members and counsel may receive such compensation as the Board of Directors may authorize. Officers shall be reimbursed for all expenses incurred by them in connection with the carrying out of their duties.

Section 5 - Disbursement of Funds

All checks drawn on the Association bank accounts must be signed by at least two (2) of the Officers and Executive Director. However, an operating account may be established on which only

one of the designated signatures is necessary, and the Board of Directors may require, in its discretion, that the signatory to such account be bonded, in which event the amount in the operating account shall not at any time exceed the amount of the bond.

ARTICLE VI - DUTIES OF OFFICERS

Section 1 - President

The President shall preside at all meetings of the Board of Directors and at all meetings of the Association. He shall appoint all committees and perform such other duties and functions as custom and parliamentary usage require.

Section 2 - First Vice-President

The First Vice-President shall assume the duties of the President at the latter's request, or in his absence.

Section 3 - Second Vice-President

The Second Vice-President shall assume the duties of the President, if the President so requests it or in the event of his absence, provided that the First Vice-President is absent or incapacitated, and in those cases where the First Vice-President has assumed the duties of the President.

Section 4 - Secretary

The Secretary shall record the Minutes of all meetings of

the Association and of the Board of Directors, receive and care for all records, papers and other documents belonging to the Association, and he shall perform all other duties or functions that usually pertain to that position.

Section 5 - Treasurer

The Treasurer shall receive and properly account for all funds of the Association, keep proper records of all receipts and expenditures, and render a complete financial report at the Annual Meeting and at such other times as may be requested by the Board of Directors; he shall deposit all funds of the Association in a checking account or accounts in the name of the Association; he shall pay all bills and other obligations incurred by the Association. He may be required, at the discretion of the Board of Directors, to give bond in such amount as may be directed, the cost of which shall be paid by the Association.

ARTICLE VII - COMMITTEES

All Committees, except those herein specifically provided for, shall be appointed by the President to perform any duties which may be required.

ARTICLE VIII - DUES AND ASSESSMENTS

Section 1

Monthly dues for membership in the Association shall consist of the sum of Ten Dollars (\$10.00) per month per shop, payable quarterly in advance.

Section 2

Any and all changes in the dues schedule or any assessments shall be made by the Board of Directors.

ARTICLE IX - AMENDMENTS

The By-Laws of this Association may be amended by a majority vote of the members in good standing. Proposed amendments must be submitted to the membership in writing at least thirty (30) days in advance of the Special or Annual Meeting at which the proposed amendment will be presented. All members in good standing shall be guaranteed the opportunity to vote on all proposed amendments either by mail or at the time of the Special or Annual Meeting at which the proposed amendment will be presented.

A proposed amendment may be initiated by a majority vote of the Board of Directors or by petition signed by not less than twenty-five (25%) per cent of the member shops in any Regional Territory.

PLAINTIFF'S EXHIBIT 8 - CERTIFICATE OF INCORPORATION

STATE OF NEW YORK DEPARTMENT OF STATE
DIVISION OF CORPORATIONS AND STATE RECORDS
ALBANY

(5)

Info

FILING RECEIPT - MISC.

TYPE OF CERTIFICATE
Incorporation- Not-For-Profit

Type A

CORPORATION NAME

DATE FILED

NATIONAL MUFFLER DEALERS ASSOCIATION,
INC.

1/29/71

FILM NO.

New York County

885499-6

LOCATION OF PRIN. OFFICE

FILER AND ADDRESS

Gordon, Frutkin & Rabin, Esqs.
32 East 57th Street
New York, New York 10022

6 DOLLAR FEE TO COUNTY

FEES AND/OR TAX PAID AS FOLLOWS:

☒ CHK. ☐ M.O. ☐ CASH \$ 50.00

\$ 50.00 FILING
\$ TAX
\$ CERTIFIED COPY
\$ CERTIFICATE

TOTAL \$ 50.00
REFUND OF \$

TO FOLLOW

JOHN P. ROMENZO
SECRETARY OF STATE

PB

CO-513M (REV. 3/66)

BEST COPY AVAILABLE

CERTIFICATE OF INCORPORATION
OF

NATIONAL MUFFLER DEALERS ASSOCIATION, INC.

Under Section 402 of the Not-For-Profit Corporation Law

The undersigned, for the purpose of forming a corporation under Section 402 of the Not-For-Profit Corporation Law, hereby certifies:

1. The name of the corporation is NATIONAL MUFFLER DEALERS ASSOCIATION, INC.

2. The corporation has not been formed for pecuniary profit or financial gain and no part of the assets, income or profit of the corporation is distributable to or inures to the benefit of its members, directors or officers, except to the extent permitted under the Not-For-Profit Corporation Law.

3. The purposes for which the corporation is to be formed are to foster and promote the interests of those individuals, partnerships and corporations who are engaged in business as muffler dealers and installers and related activities in the United States, to promote cooperation and mutual interest among its members, to advance the trade and commerce of its members, to encourage the exchange of ideas among its members for their common good and welfare, to secure, classify and disseminate to its members all information essential or helpful in the conduct of their businesses.

To do any other act or thing incidental to or connected with the foregoing purposes or in advancement thereof.

Nothing contained in this Certificate shall authorize or empower the corporation to perform or engage in any acts or practices prohibited by Section 340 of the General Business Law or other anti-monopoly statute of this State.

4. The corporation is a Type A corporation.
5. The city and county in which its office is to be located are City of New York, County of New York.
6. The territory in which the corporation's activities are principally to be conducted is the United States of America.
7. The post office address to which the Secretary of State shall mail a copy of any notice required by law is c/o Gordon, Frutkin & Rabin, 32 East 57th Street, New York, New York 10022.
8. The subscriber is of the age of nineteen years of age or over.

IN WITNESS WHEREOF, this Certificate has been signed by the subscriber this 18th day of January, 1971.

MYRON P. GORDON
32 East 57th Street
New York, N. Y. 10022

A-216

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

On this 18th day of January, 1971, before me personally came MYRON P. GORDON, to me known, and known to me to be the person described in and who executed the foregoing Certificate of Incorporation, and he duly acknowledged to me that he executed the same.

IRMA SHAPIRO
Notary Public, State of New York
No. 31-8938240
Qualified in New York County
Commission Expires March 30, 1972

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

MYRON P. GORDON, being duly sworn, deposes and says that he is the subscriber to the annexed Certificate of Incorporation and a member of the firm of GORDON, FRUTKIN & RABIN, attorneys at law; that no previous application for the approval of said Certificate by any Justice of the Supreme Court has ever been made.

Sworn to before me this
18th day of January, 1971

MYRON P. GORDON

INA SHAPIRO
Notary Public, State of New York
No. 31-8938240
Qualified in New York County
Commission Expires March 30, 1972

I, SAMUEL M. GOLD, a Justice of
the Supreme Court of the State of New York, of the First
Judicial District of the County of New York, hereby approve
the foregoing Certificate of Incorporation of NATIONAL
MUFFLER DEALERS ASSOCIATION, INC. pursuant to the Not-
For-Profit Corporation Law of the State of New York.

Dated, this 22 day of JANUARY, 1971.

SAMUEL M. GOLD
Justice of the Supreme Court
of the State of New York.

NO OBJECTION. NOTICE WAIVED
LOUIS J. LEFKOWITZ
ATTORNEY GENERAL OF
THE STATE OF NEW YORK.
by PERCY E. SCHUBERTH
ASSISTANT ATTORNEY GENERAL

DATED JANUARY 20, 1971

DEFENDANT'S EXHIBIT A - ANSWERS TO INTERROGATORIES
(WITH AGREED UPON ATTACHMENTS)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

NATIONAL MUFFLER DEALERS
ASSOCIATION, INC..

Plaintiff,

- v -

UNITED STATES OF AMERICA,

Defendant.

:

:

:

:

:

:

-----x

ANSWERS TO
INTERROGATORIES
PROPOUNDED TO
PLAINTIFF

75 Civ. 3228

(JUDGE PIERCE)

1. (a) State your full names, date of incorporation, present residence, and the index number under which you are filed for doing business.

1. (a) The name of the corporation is National Muffler Dealers Association, Inc., 32 East 57th Street, New York, N.Y. The corporation was incorporated on January 29, 1971.

1. (b) If you have ever been known and/or incorporated under any other name prior to the date of present incorporation, state that name, place of previous residence, and the date of formation. Indicate whether or not you were previously incorporated and include the index number under which you were filed if you were incorporated.

1. (b) The Association has never been known or incorporated under any other name.

2. State the names of each and every committee, if any, formed for purposes of drafting the By-Laws of National Muffler Dealers Association, Inc. (hereinafter By-Laws).

3. Identify each and every person, if any, who participated in the drafting of the By-Laws. Include all committee and subcommittee members, both formal and informal, who worked on the draft.

4. State the dates, if any, the persons who participated in the drafting of the By-Laws met to discuss their content.

5. Identify each and every party, witness, person, document, writing, record and minutes pertaining to the drafting of the By-Laws.

Questions 2 - 5 (Consolidated pursuant to agreement with counsel). * In the Fall of 1970 a number of Midas muffler franchisees became concerned with the dispute between Nate Sherman and his son Gordon Sherman, who together had been running the business of Midas-International Corp., the franchisor. As a result, several representative dealers met to consider the formation of a trade association which would protect the franchisees from the possible ill effects of the internecine warfare and the damage to their businesses which might otherwise result.

* Certain questions have been consolidated pursuant to agreement with counsel for the defendant. In addition, in certain instances, as also agreed with counsel, plaintiff has made no specific response to interrogatories seeking certain documentation. (See, e.g., Interrogatory 26). All documentation appears in response to Interrogatory 36.

A few of the concerned dealers consulted with Myron P. Gordon, attorney, and retained him to work towards the establishment of such a dealer association. They further authorized him to organize a Not-For-Profit corporation under the laws of the State of New York and to aid them in seeking the support of franchisees. The corporation was organized on January 29, 1971 and, both before and after that date, letters were sent to franchisees asking them to join the association.

When it appeared that there was substantial interest in the formation of such an association, a meeting was called for March 10, 1971 in Chicago, at which meeting a substantial number of dealers attended. At that meeting Mr. Gordon presented proposed By-Laws which he had drafted and these were discussed at length, changed in some respects, and eventually adopted by those present at the meeting. At that meeting temporary officers and directors were also elected. It is not now possible to identify each and every person who was involved in the various discussions and in the meeting on March 10, 1971.

6. (a) Identify each and every person who is a member of the Board of Directors of N.M.D.A.

6. (a) Board of Directors:

Arthur Azarchi
Stanley Berkson
Stanford Brown
Marvin Buntrock
Alan Caplan
Bernard Diamond
Gary Gilbert
Fred Goldman
John Greene
Sam Latino
Howard Lichterman
Herbert Marchick

Donald Lustig
Robert Mc Neil
Charles Margolin
Jerry Orns
Robert Schroeder
Melvin Shapiro
Joseph Sipocz
Maxwell Spencer
Dick Stranik
Bob Walenta
Harold Ziskin

6. (b) What, if anything, is the salary earned by each and every board member?

6. (b) There are no salaries paid to any member of the Board of Directors.

7. (a) Identify each and every person who is employed by N.M.D.A.

7. (a) The Association has no employees.

7. (b) What, if anything, is the salary earned by each and every board member?

7. (b) Not applicable.

8. Identify each and every member of N.M.D.A.. Include the date each and every person became a member.

8. See annexed Membership List, annexed as Exhibit A.

9. (a) What is the amount of dues owed by each and every member of N.M.D.A.

9. (a) The dues of each member amounts to \$15.00 per month per shop. They were \$10.00 per month per shop until December 1, 1975.

9. (b) Are membership benefits related in any way to the amount of dues paid by the respective members?

9. (b) Membership benefits are not related in any manner to the amount of dues paid by the respective members.

9. (c) If so, describe and explain that relationship.

9. (c) Not applicable.

10. What are the responsibilities of each and every member of N.M.D.A.?

10. The only responsibility of each member is to pay the dues as set forth above.

11. Are any of the persons identified in response to question 8, supra, Midas Muffler franchisees?

If so:

a) State which ones

a) All members of the Association are Midas muffler franchisees.

b) State the obligations which each and every Midas franchisee has to Midas, i.e., exclusive dealings with Midas products, adherence to Midas standards, indemnification agreements, rents, etc.

b) See Franchise Agreement annexed hereto as Exhibit B.

c) Identify each and every record, communications and document relating to 9 (b), supra.

c) Withdrawn by consent.

d) State what percentage of all Midas Muffler franchisees are members of N.M.D.A. Identify your sources.

d) 78% of Midas Muffler franchisees in the United States are presently members. Percentage is derived by comparing list of members, above, with list of all Midas franchisees.

12. Are any of the persons identified in response to question 8, supra, franchisees of any other muffler-franchisor?

If so:

a) State which ones.

b) State the obligations which each and every franchisee has to his/her respective franchisor, i.e.: exclusive dealings with franchisor's products, adherence to franchisor's standards, indemnification agreements, rents, etc.

c) Identify each and every record, document, and communication relating to 12 (b), supra.

12. No member is known to be a franchisee of any other muffler franchisor.

13. State what percentage of all muffler franchisees are members of N.M.D.A. Identify your sources.

13. Not known.

14. (a) Does N.M.D.A. promote the products of the muffler industry?

(b) If so, describe the manner in which it promotes the products and identify each and every witness, record, document, and communication to same.

14. National Muffler Dealers Association does not promote the products of the muffler industry.

15. (a) Does N.M.D.A. improve the standards or conditions of the muffler industry?

(b) If so, describe the manner in which it improves the conditions of the industry and identify each and every witness, record, document, and communication to same.

15. (a) and (b) - National Muffler Dealers

Association attempts to improve standards and conditions under which Midas franchisees operate. It does so by attempting to redress the economic imbalance which exists between a large and financially powerful franchisor and its individual franchisees. Examples of such action accomplished by the Association include the negotiation on behalf of the franchisees of a new twenty-year franchise agreement which greatly improved the conditions under which Midas franchisees operate. Another example is the negotiation between the Association and Midas-International Corp. which led to the elimination of a service charge which Midas had theretofore required the franchisees to exact from customers who took advantage of the Midas guarantee. Thus, by increasing the negotiating strength of the dealers, the Association has enabled the dealers to cause Midas to be more responsive to their needs as well as the needs of the consumers, thereby improving the standards and conditions of the muffler industry.

15. (c) Does N.M.D.A. promote or improve the business conditions of any other line of business?

15. (c) The Association does not promote or improve the business conditions of any other line of business, except, indirectly, that members do engage in additional lines of business such as shock absorbers, brakes, etc.

15. (d) If so, state which ones and describe the manner in which it improves conditions in such other lines

of business; and identify each and every witness, record, document and communication to same.

15. (d) In the same manner as stated in the answer to 15 (b).

16. Does N.M.D A. advance the interest of the community? If so:

(a) Describe the manner in which N.M.D.A. advances the community interest.

(b) Describe the community whose interest is advanced.

(c) Identify each and every witness, record, document, and communication to same.

16. To the extent that the Association improves the image of the industry and makes the public aware of the need for efficient muffler and exhaust systems, which are anti-pollution devices, it can be said that the Association advances the interest of each community served by a muffler franchisee.

17. (a) Does N.M.D.A. provide its members with an economy and convenience in the conduct of their individual businesses?

(b) If so, describe with specificity the manner in which N.M.D.A. provides its members with such economy and convenience and identify each and every witness, record, document, and communication to same.

17. See Answer to Interrogatory #15 above.

18. Does N.M.D.A. promote the products of a particular muffler company?

If so:

- (a) State which one.
- (b) Describe the manner and date of each and every promotion.
- (c) Identify each and every record, document, and communication relating to 18 (b), supra.

18. The Association does not promote the products of any muffler company.

19. (a) Describe the manner in which N.M.D.A. "produces and promotes the interest of parties engaged as franchisees in the business of automobile muffler installation and repair" as alleged in paragraph 5 of N.M.D.A.'s complaint.

19. (a) The Association protects and promotes the interests of Midas franchisees by acting for them in dealing with the parent company in connection with problems common to all franchisees. Thus, in effect, the Association acts as a bargaining representative for its members in dealing with the parent company, in much the same way as a union acts as a bargaining representative in dealing with employers.

19. (b) Is this one of N.M.D.A.'s principal or primary activities?

19. (b) This is one of N.M.D.A.'s principal or primary activities.

19. (c) Identify each and every witness, record, documents, and communication to same.

19. (c) See Footnote, page 2.

20. (a) Describe the manner in which N.M.D.A. "promotes cooperation among its members to assist its members in dealing with mutual problems arising from their relationship with their franchisor" as alleged in paragraph 5 of N.M.D.A.'s complaint.

(b) Is this one of N.M.D.A.'s principal or primary activities?

(c) Identify each and every witness, record, document and communication to same.

20. See Answer to Interrogatory #19, above. The best reflection of the Association's efforts in this regard appears in the Newsletter which is sent to members. As agreed with counsel for the defendant, a copy of each Newsletter which has been sent to membership since the inception of the Association is annexed hereto, cumulatively, as Exhibit C.

21. (a) Describe the manner in which N.M.D.A. solicits membership.

21. (a) The Association solicits membership by mailings to non-members and by having members of the Board of Directors or individual members discuss the benefits of membership with non-member franchisees.

21. (b) Identify each and every record, document and communication to same.

21. (b) A copy of the most recent solicitation letter to non-members, a letter from the new president of the Association, dated November 27, 1975, is annexed hereto as Exhibit D.

22. Identify all communications between N.M.D.A. and its members. Include newsletters.

22. The basic communication between the Association and its membership consists of the Newsletters. (See Exhibit C).

23. Are the newsletters and reports issued by N.M.D.A. sent to dealers or others who are not members of N.M.D.A.

If so:

- a) At what cost?
- b) Who pays for the newsletter?
- c) Identify the recipients?

23. (a) - (c) (Consolidated by consent of counsel). Newsletters and reports are, on occasion, sent to Midas dealers who are not members in order to induce them to become members. When that is done, it is done at an insignificant expense, borne by the Association.

23. (d) Is the printing and distribution of the newsletter a principal or primary activity of N.M.D.A.?

23. (d) The printing and distribution of the Newsletter is not a principal or primary activity of the Association.

23. (e) What is the primary purpose of the newsletter?

23. (e) The primary purpose of the Newsletter is to advise the membership of the activities of the Association, to keep them abreast of developments within the industry, and to solicit their opinions and input regarding future directions and efforts of the Association.

24. Are there any advertisements in N.M.D.A.'s newsletter?

If so:

a) Whose products are advertised?

b) How are the advertisements paid for?

24. The Newsletter contains no advertisements.

25. (a) List all other activities performed by N.M.D.A. not listed in response to questions 14 through 23, supra.

(b) Describe each such activity in detail.

25. (a) (b) National Muffler Dealers Association conducts annual conventions. The first convention was held on October 18, 1971 at the Arizona Biltmore Hotel in Phoenix, Arizona. The second convention was held on October 22, 1972 at the Key Biscayne Hotel, Key Biscayne, Florida. The third convention was held on October 23, 1973 at the Broadmoor Hotel in Colorado Springs, Colorado. The Fourth convention was held on October 28, 1974 at the Hotel del Coronado in Coronado, California. The fifth convention was held on November 2, 1975 at the Fairmont Hotel in New Orleans, Louisiana.

Details of the proceedings at the conventions are contained in the Newsletters and in the speeches which are reported in the Newsletter.

In addition, National Muffler Dealers Association sponsors two insurance programs through Sentry Insurance, one a life insurance and health insurance program, and the other a workmen's compensation and casualty insurance program.

25. (c) Identify each and every witness, record, documents and communication to same.

25. (c) See Newsletters, Exhibit C.

25. (d) With respect to all of N.M.D.A.'s activities listed in response to questions 14 through 25(a), supra, approximate.

(i) amount of time devoted to each and every activity per year,

(ii) the percentage of time devoted to each activity in relation to the total time devoted by N.M.D.A. to N.M.D.A. activities.

25. (d) Withdrawn by consent.

26. From what sources are N.M.D.A.'s income derived? Identify each and every witness, document, record and communication (including receipts and checks) to same.

26. The Association's income is derived entirely from dues and the return on surplus funds which are invested from time to time until they are needed. In addition, new members who have been dealers for over one year are required to pay a one time enrollment fee of \$75.00.

27. Do any part of the assets of N.M.D.A. inure to the benefit of N.M.D.A.'s members.

If so:

(a) What part of N.M.D.A.'s assets inure to its members?

(b) Identify each and every book, document and record which reflects same.

(c) If not, identify with specificity to whom do the assets inure and in what amounts?

27. No part of the assets of the Association inure to the benefit of individual members.

28. (a) Describe with particularity to what use, if any, the gross income of N.M.D.A. is put.

(b) Itemize and identify each and every document, record and communication (including receipts, checks and bills) to said expenses.

28. (a) (b) Copies of Financial Statements for the years ending November 30, 1971 through November 30, 1974, annexed hereto, cumulatively, as Exhibit E.

29. (a) State the city, state and nation in which each and every N.M.D.A. convention was held.

(b) State the date on which each and every convention was held.

(c) State the name of the hotel at which each and every convention was held.

(d) State what accommodations were made available to the N.M.D.A. convention members by each and every hotel, i.e.: which hotel rooms, how many meals and which one, which facilities, etc.

(e) State how many N.M.D.A. members attended each and every convention. Identify each and every member.

(f) Did any persons who were not N.M.D.A. members attend each and every convention?

(g) If so, identify those persons and indicate what their interest was in attending the N.M.D.A. conventions.

(h) State where each and every meal and/or snack was eaten at each and every convention.

(i) Was there any entertainment at any of the N.M.D.A. conventions?

If so:

- i. State at which conventions.
- ii. Describe the mode or modes of entertainment at each and every convention.
- iii. State the costs of each and every entertainment at each and every convention.
- iv. State who incurred the costs of each and every entertainment at each and every convention.

(j) Identify each and every document, record and communication (including receipts, checks and bills) mentioned in response to questions 29(a) - (h), supra.

29. (a)-(j) As agreed with counsel, we have annexed hereto copies of the programs for each convention held by the Association.

30. Was any of the income identified in response to question 26, supra, not expended for purposes described in response to questions 27, 28 and 29, supra?

If so:

(a) State whether or not any of the net income was invested. Identify each and every record, document and communication (including receipts and checks) to same.

(b) State what else was done, if anything, with the income netted after all expenses and investments described in response to questions 19, 20, 23, 24 and 25, supra, were met. Identify each and every record, document and communication (including receipts and checks) to same.

30. (a) (b) From time to time surplus funds of National Muffler Dealers Association were invested in Certificates of Deposit and in shares of Dreyfus Liquid Assets. \$10,000.00 was invested in a Certificate of Deposit in February, 1973 in the United Bank of Chattanooga and \$15,000.00 in January, 1974 in the Trust Company of Columbus, and beginning February, 1975 all surplus funds have been invested in Dreyfus Liquid Assets.

31. Upon dissolution of N.M.D.A., to whom would the company's assets inure?

31. See the provisions of the Not-For-Profit Corporation Law of the State of New York (Sec. 1001, et seq.).

32. Are there any obligations, formal and/or informal, between N.M.D.A. and Midas?

(a) If so, describe with specificity each such obligation.

(b) If so, identify each and every witness, person, document, writing, record (including correspondence) relating to such obligation.

32. (a) (b) Informal arrangements exist whereby Midas-International Corp. has agreed to consult the Association before instituting any new programs which might affect the profitability of the dealers.

33. Are there any other corporations formed for the purpose of promoting the interests of parties engaged as franchisees in the business of automobile muffler installation and repair?

If so:

(a) State the name and residence of such corporation.

(b) State the numbers of members in each and every corporation enumerated in response to 33(a), supra, and identify each and every member of each and every corporation.

33. (a) (b) We are unaware of any other corporations formed for the purpose of promoting the interests of parties engaged as franchisees in the business of automobile muffler installation and repair.

34. State the names and addresses of all persons, other than those mentioned in answer to the preceding interrogatories, who you believe have any knowledge or information pertaining to the claims alleged in the complaint and state the nature of such knowledge or information and identify any documents they possess or possessed pertaining in any way to the allegations in the complaint.

34. We have no knowledge of any such persons other than those mentioned in answer to the preceding Interrogatories.

35. (a) List the names, addresses and official titles, if any, of all witnesses, including expert witnesses, who it is contemplated will be called upon to testify in support of the claims in this action; indicate the nature and substance of the testimony which it is expected will be given by each such witness.

(b) With respect to each expert witness named in response to interrogatory state,

- i. his/her field of expertise;
- ii. the subject matter on which he is expected to testify;
- iii. the substance of the facts and opinions to which he is expected to testify.
- iv. a summary of the grounds for each of the opinions to which he is expected to testify;
- v. the name and date of any treatise, books,

articles, essays or other writings published or unpublished by the expert, relating in any way to the subject matter on which he is expected to testify, for each published article and essay, state the title of the book, journal or other work in which it can be found and the name of the publisher.

35. (a) (b) As presently contemplated, the sole witness will be Myron P. Gordon, Executive Director and Attorney for the Association since its inception.

36. Identify all exhibits which it is contemplated will be offered by plaintiff in support of the claims in this action.

36. As presently contemplated, plaintiff will offer no exhibits other than those which are annexed to the Answers to these Interrogatories and the old franchise agreement between dealers and Midas, annexed hereto, Exhibit F.

NATIONAL MUFFLER DEALERS
ASSOCIATION

Sworn to before me, this
day of Janury, 1976.

By: _____
HOWARD LICHTERMAN,
President

DEFENDANT'S EXHIBIT B - AGREED UPON NEWSLETTERS

NEWSLETTER

JUNE
1971

National Muffler Dealers Association, Inc., 32 East 57 Street, New York, N. Y. 10022

We publish below, without further comment, a statement by our attorney.

In talking to various Midas dealers, I have just begun to realize the breadth of the misconceptions about the origins and purposes of the Association. In my opinion, it is essential that the record be set straight.

The first misconception is that the Association was organized for the purpose of aiding Gordon Sherman in his proxy fight. Nothing could be further from the truth. Anyone who was part of the birth process, as I was, knows that there was not even a whisper of an impending battle when we began our discussions. From the Association's viewpoint it was unfortunate that the battle did occur while we were organizing. It was doubly unfortunate that some of our members were involved, emotionally and otherwise. We set out as an Association to maintain a position of strict neutrality. If we gave anyone any impression to the contrary, it was entirely inadvertent. In any event, the battle is over. Our reasons for associating together are just as valid now as they were when we started. It is still in the interest of all Midas dealers to cooperate with each other, to provide a forum for the exchange of ideas and to devise and implement solutions to common problems.

The second misconception is that the leaders of the Association are a bunch of hot-eyed militants. Again, this is completely untrue. In the first place, all of the officers and directors are themselves shop owners whose sole purpose is to protect their investment and have their business prosper. Militants invariably are people with little or nothing to protect. In the second place, I know of nothing to be militant about. Certainly, there are areas in the franchise program which require re-examination. But there is not the slightest reason to anticipate that management at Midas will be so unreasonable as to give any cause for a war with the dealers. Furthermore, I have always found that militancy is a last resort and is more often than not counterproductive and I would not represent an organization which believed otherwise.

Another supposed problem arises because Midas management has repeatedly stated that it would not "recognize" the Association and some dealers are afraid of reprisals if they are active in the Association. Those of us who are old enough can remember when the United States refused to recognize Russia and we are even now witnessing a reversal of the same position with China. Can anyone doubt that, recognition or not, we always kept in mind what Russia or China might do? Can anyone doubt that Midas must always be aware of our Association and what we say and do?

Insofar as fear of reprisal is concerned, that too makes little sense. Aside from the clear illegality of any attempted reprisals, management at Midas has too much common sense and too much business acumen to enter upon a campaign which would harm the program. The Association is not a threat to Midas and management knows it. It will, in my opinion, eventually come around to agreeing with us that only good can come of working together with us.

In the meantime, we must continue to grow and to get to know each other better. We must continue to discuss mutual problems and continue to communicate with Midas. Make no mistake --- they are listening!

Myron P. Gordon

ADDRESS BY E. W. RINKA, SENTRY INSURANCE

THIRD ANNUAL NATIONAL MUFFLER DEALERS ASSOCIATION CONVENTION

COLORADO SPRINGS, COLORADO

OCTOBER 23, 1973

"PRODUCTS LIABILITY AND CONTROL"

Businessmen cannot afford to ignore their exposure to products liability and expect to remain in business. Applied to your business, let's see how products liability arises out of the work you do for a customer and what you can do to control that exposure and defend yourself if necessary.

The service function expands the potential liability exposure beyond products performance to include the "completed operations hazard". Products liability is generally thought of as the sole concern of the manufacturer. While it is true that the manufacturer is responsible for safe design, market application, fabrication, and performance, you, the franchised dealer, have the responsibility of proper installation and service.

This is an important distinction as you will see when it comes to deciding who is liable. In most cases of failure, whether it be a defect in the product or defective installation, you will be implicated along with the manufacturer. The outcome of such litigation will depend upon how well you have prepared yourself for this contingency.

In the last decade, we have witnessed a dynamic effort by the organized plaintiff's bar to develop the legal theory of "strict liability throughout the United States". The relative security of the seller of goods and services has been seriously eroded and is now under effective attack. Strict liability means that the claimant must prove that the product was in a defective condition (unreasonably dangerous to the consumer or user) when it left the seller's control and that the defect caused the claimant's injury while it was being properly used for a purpose reasonably foreseeable by the seller.

"SUE FOR SAFETY"

Capable Trial Attorneys are applying their skills, sharpened on automobile cases and encouraged by a wave of consumerism, to products liability. The Occupational Safety and Health Act and Products Safety Act provide recognized standards on which to base litigation. The only effective response is product safety.

The law in most states permits the customer to bring an action directly against the manufacturer or dealer. There does not necessarily have to be a seller-buyer relationship. The claimant may be a passenger, a bystander, or user of the defective product. A Midas dealer may repair the brakes on a customer's automobile, which later failed because of defective installation. The car strikes a pedestrian in the crosswalk. The pedestrian can bring suit against the Midas dealer. The owner and/or driver of the vehicle can also recover damages against the Midas dealer.

WARRANTIES

Expressed warranties, written or oral, may be construed against you. They are an allegation by the seller that his goods or services meet certain specifications. For example, the shop sign advertising "Free Safety Inspection" now imposes a legal obligation well beyond what was originally contemplated by the dealer. We are familiar with newspaper advertising which offers a complete brake overhaul for any standard size American automobile, \$34.95. The meaning of what is "complete" in the public's mind later becomes a question for the jury. In any respect, the work completed will have to meet industry standards for service life.

Consider the expression, "Guaranteed Work". What the dealer had in mind was parts and labor, not unlimited liability! That brings us to the other form of warranty, the implied warranty. When you as the dealer provide a service or product, there is a valid assumption on the part of the purchaser that the product or service will be reasonably fit for the intended use. Where the customer is led to purchase the goods or services by advertisement, he has a right to expect that the product or service be as represented. The Midas "guaranteed for life" warranty may be interpreted literally. Midas will be obligated to back up this claim.

The proper installation of the equipment is your responsibility. The dealer is obliged to follow the manufacturer's recommendations in making the correct application and it is implied that the system will be gas tight and structurally sound. That means that six months on the road in the middle of winter if the owner of the car perishes from carbon monoxide poisoning as a result of a leak in the system, you are going to be sued. The measure of adequate service is the ability of the dealer to install, modify, or repair a product in such a manner as to restore or improve its original performance.

A close relationship between the manufacturer and the dealer is very important. The relationship should include standards of operation, counsel, training programs, technical references, and authorized replacement parts.

DUTY TO WARN

Because you are specialists in your field, the courts will charge you with "superior knowledge". The service manager has an obligation to advise the customer on needed repairs, perhaps even to refuse to accept an order for incomplete repairs, which will compromise the safety of the customer. An example here will help you to follow this line of thought. You will recognize the case where the husband sends his wife to the service garage with instructions to tell the service manager that the front wheels should be balanced. The service manager may elect to follow the instructions implicitly or he may recognize the need to inspect the vehicle. The latter course of action is the most prudent one. The problem may not be with wheel balance at all. Inspection may reveal worn ball joints or tie rod ends. His obligation is to warn the customer of the defect, recommending that the worn parts be replaced before the car is returned to service. If the wife declines to authorize repairs, a notation should be made on the service order and she should be asked to sign the order.

DUTY TO INSPECT

When you take possession of the customer's automobile for the "Free Safety Inspection", you are obligated to perform a thorough inspection. You would have to consider the model, age, and mileage of the vehicle involved. If the mileage is relatively low, say less than 30,000 miles on a car one or two years old, you may honor the customer's request to replace only the brake linings. This work would probably begin by removal of the front wheel, hub and bearing assembly to inspect the front wheel linings which receive the most wear. Several grades of brake linings will be available for the aftermarket. The original brake lining may have been bonded or riveted to the shoes. Your selection will have to be of the same type, equal to or better than OEM equipment.

YOU MUST MEET INDUSTRY STANDARDS

Suppose the vehicle has high mileage, indicating that the brake linings have probably been replaced. In evaluating the work to be performed, one must consider the condition of the hydraulic system as well as the front wheel bearings, brake drums, and linings. You will make a professional judgment as to whether the wheel cylinders will be reconditioned with overhaul kits or whether experience with this particular make or model of vehicle indicates the need to replace the cylinders. I'll assume that you have appropriate equipment for turning the brake drums and that having done so, that you will cam grind the brake linings to restore concentricity. Finally, you would flush the system and replace the brake fluid with fluid which meets the current Federal Motor Vehicle Safety Standards and adjust the linings. The vehicle should be tested before release to the customer.

RECORDS ARE NECESSARY

What do you do when you have inspected the brake system and the customer declines to follow your recommendation for a complete overhaul? If you have removed the front wheel bearings to make the inspection, it would be necessary for you to clean, inspect, lubricate, replace and adjust the wheel bearings so that there is no possibility of wheel bearing failure immediately following your inspection. For your protection, complete a work order to record the fact that the vehicle was inspected, an overhaul recommended and that the customer declined. Seek his signature on the work order if possible before you release the vehicle to him. If he objects to signing the work order, at least maintain a copy on file. How long? I would recommend at least one year.

The same principles apply to front end alignment work. There is not too much inherent exposure in replacing shock absorbers, but ball joints and tie rod ends should be inspected for unusual wear.

OEM VS. UNIVERSAL APPLICATIONS

Exhaust systems are your primary source of revenue. I have said that they are expected to be gas tight and structurally sound for a reasonable length of time following repair or replacement in your shop.

The matter of structural integrity bears directly on the kind and quality of connections in the system. As you know, original equipment systems are usually welded together except for connections to the main muffler. In the after-market, the practice has been to replace parts of the system mating original sections with new sections increasing the number of connections. As you increase the number of connections in the system, you also increase the possibility of failure in the system. Duplicating the manufacturer's equipment or application poses no special problem. Deviation from the original design increases your exposure unless you can demonstrate that the Midas system is actually superior to OEM equipment. If you should choose to follow either the OEM or Midas applications, you will be left holding the bag in event of a lawsuit.

From a practical standpoint, it may be necessary to use universal parts on older vehicles for which custom equipment is no longer carried in inventory. You must be satisfied that your application will be reliable. I do not recommend the "universal" approach to late model exhaust systems. There you run the risk of deviation from standard equipment or defective application.

You are aware that exhaust systems are designed with emission standards in mind and are calibrated to maintain a specified level of back pressure in the system. A substitution of equipment in the system may change the performance characteristics. Another

consideration is the structural integrity of the system which the manufacturer has considered in locating and designing the supports and connections. Stress is concentrated at points along the system, a consideration of the original design. With the emphasis on fuel economy and the energy crisis, we will see more four cylinder engines powering compact vehicles. Four cylinders engines by nature produce resonant vibrations. Some literally punish an exhaust system. Increasing the number of connections in such a system certainly increases the probability of failure.

Let me put all that I have said into perspective. You are in trouble only if the failure results in serious bodily injury or property damage. At that point you have two strikes against you. It is said there are three essential elements to a successful products liability lawsuit: a defective product or service, a personal injury and a collectible defendant.

CONTROLS

You may find some comfort in knowing that the cost of preparing a suit against you is just as expensive as your defense will be. A well organized defendant is the best deterrent to promiscuous legal action. What you do to prepare yourself before the loss or suit is far more beneficial than after the fact.

Now what can you do to control the exposure and to defend yourself if necessary? (1) Maintain adequate records of the work completed in your shop. (2) Orientation and training of your service personnel is necessary. (3) Proper selection and installation of replacement parts requires good management.

Once you are presented with a loss situation, contact the customer immediately. If possible arrange for inspection of the defective parts to analyze the reason for failure. This should be done professionally with the help of your insurance company's claims department, legal counsel and a qualified examiner. The evidence should be documented professionally. This might involve a photographer or independent testing laboratory.

You're going to want to determine how the accident occurred and the probability of your involvement. If it involves failure of the product itself, perhaps you will be able to sidestep the litigation which will be redirected towards the manufacturer of the product. If it is the installation or service which is defective, you will need to muster your defense.

In most cases, we are certain that you will be named in the suit along with other parties and will require defense at least until you have been dismissed from the suit if you are able to prove that you are not responsible for the loss.

In closing, I'd like to get in the only commercial of this presentation. Sentry Insurance has extensive experience in the products liability field. We have trained field engineers to survey your exposure and Claims specialists in handling products liability litigation. We are currently underwriting programs for several very large manufacturers.

More than ever, you need to support your Association and the programs which the Association endorses. Professional service in Workmen's Compensation and Products Liability is available to you through the insurance program.

There is more to an insurance program than price. Sometimes the price is more than you can bear.

BEST COPY AVAILABLE

NEWSLETTER

JULY
1974

National Muffler Dealers Association, Inc., 32 East 57 Street, New York, N. Y. 10022

STATEMENT OF OBJECTIVES ADOPTED AT A JOINT MEETING OF MIDAS-INTERNATIONAL CORPORATION AND THE MIDAS DEALER ADVISORY COMMITTEE HELD IN CHICAGO ON JUNE 27, 1974

Both Midas-International Corporation and the Midas Dealer Advisory Committee, representing all Midas dealers, deem it of vital importance that a program be adopted for effective and responsible liaison between Midas and its dealers. To that end they have adopted the following Statement of Objectives:

1. It is the intention of Midas to provide assurances that individual dealers and groups of dealers will be permitted to discuss their problems through designated representatives, including the National Muffler Dealers Association. Midas, of course, reserves the right to deal directly with an individual dealer at all times.
2. The Dealer Advisory Committee intends to provide assurances to Midas that Midas has the sole right to conduct its business as it sees fit and that it is not required to bargain with any group of dealers. Midas, however, recognizes that certain new programs or policy changes may have a significant impact upon the dealers, and, therefore, Midas will endeavor, wherever practicable, to inform and discuss such programs with representatives of the dealers before they are implemented.

The parties will continue discussions looking towards the early establishment of procedures to implement the foregoing objectives.

NOTE: In order that all dealers, both members and non-members alike, receive this important announcement and the report of the Midas - Dealer Advisory Committee meeting which follows, we are sending this issue of our regular Newsletter to all dealers.

REPORT OF DEALER ADVISORY COMMITTEE MEETING HELD ON JUNE 27, 1974

The Dealer Advisory Committee met with top Midas management on June 27, 1974 in Chicago. Attending for the Company were Ralph Weiger, Ed Seils, Bill Strahan, Russ Richards, Dick Klarcheck, Jerry Kerr and Bob Bailey, General Counsel. Attending for the Dealer Advisory Committee were Harold Forkas, Hugh Landrum, Fred Goldman, Stanley Brown, Jim Coatsworth, Bill Curran, Herb Marchick and Gary Gilbert. Also attending was Myron Gordon.

Ralph Weiger opened the meeting and explained that the last two years had been a transitional period for IC Industries as the new owner of Midas and, as the new President, he wanted to start fresh and work forward without recriminations as to what had occurred in the past. New management aimed to be responsive to the needs of the dealers, and, in order to achieve that, there must be a new look at the dealer-district manager relationship as the basis for a brighter future. It was his hope that from here on management and the dealers would be talking to each other in order to solve mutual problems.

As the first order of business a Statement of Objectives was adopted, which appears on the first page of this Newsletter. Other items were discussed as follows:

ADVERTISING

In addition to maintaining the national TV advertising program, a strong local advertising program will be instituted and the Company will appoint a regional advertising manager in each region to implement such a local program in conjunction with the regional sales manager and local dealers.

PRICING

The Company pledged to direct a major effort to becoming fully competitive in every aspect of its business. Progress may be expected in the near future.

REAL ESTATE

It is now Company policy that a dealer may own his own real estate provided he leases the property to Midas and Midas leases it back to the dealer. The purpose of the lease and sublease arrangement is strictly for program control so that an advantageous location may not become the site of a competitive shop. The terms of the lease will be adequate to protect the income of the owner of the property.

A satellite shop program will be implemented whereby an existing dealer may locate an additional smaller shop in an advantageous location where market conditions warrant. For example, there might be an abandoned gas station which may be converted into a Midas image shop at a lower cost.

EXPANSION

Existing dealers will, where warranted, be given the opportunity to expand.

District managers will talk to the dealers in an area in advance of any commitment being made for a new shop in that area.

It is the intention of the Company that it will not generally build and operate its own shops and will not buy an existing shop except in a distress situation.

SHOCK ABSORBERS

The Company agreed to immediately undertake an in depth study of the competitive aspects of its shocks program.

RECOGNITION OF ASSOCIATION BY MIDAS SPURS MEMBERSHIP DRIVE

Now that Midas has agreed to recognize the Association, many of the few remaining non-members are showing an increased interest in joining our ranks. We know that some dealers have, in the past, hesitated because of a feeling that Association membership was in some fashion inconsistent with loyalty to the Midas program. Recognition, however, should remove all such hesitation.

We urge everyone to join now so that we can truly be the voice of all the dealers. Don't miss out on being part of the action in the exciting months ahead. Tear off and return the membership application blank printed below, together with your check for membership dues.

NATIONAL MUFFLER DEALERS ASSOCIATION, INC.
32 East 57th Street
New York, N.Y. 10022

APPLICATION FOR MEMBERSHIP

The undersigned agrees to become a member of NATIONAL MUFFLER DEALERS ASSOCIATION, INC. and agrees to pay initial dues of \$10.00 per month per shop, payable quarterly in advance, as well as all applicable enrollment fees.*

Check of \$ _____ attached.

Name of Member

Address of Member

- * If you have owned your shop for more than one year, there is an enrollment fee of \$75.00. If you have owned your shop for less than one year, there is no enrollment fee.

DIRECTORS NOMINATED

Under the By-Laws the term of approximately one-third of the Directors expires each year. As a result, in the Fall of 1974 five vacancies will occur which are to be filled for three year terms. Jim Coatsworth, Bill Curran and Amie Yusim, having served full three year terms, are not now eligible for re-election. In addition, the Northeast and the West will be entitled to one additional Director each because of the increase in the number of member shops in those areas, these Directors to serve also for a three year term. For the purpose of filling these vacancies, the President appointed a Nominating Committee consisting of Stanley Brown, Fred Goldman, Hugh Landrum, Howard Lichterman and Jerry Orms, each representing a different Regional Territory. The Nominating Committee has made the following nominations:

- | | | |
|-------------------------------------|---|--|
| Northeastern Region | - | Arthur Azarchi, Pennsylvania
Alan Caplan, Connecticut |
| Midwestern Region | - | Melvin Shapiro, Illinois |
| South ^{ern} central Region | - | Sam Latino, Louisiana |
| South ^{central} Region | - | Joseph M. Sipocz, Maryland |
| Western Region | - | Bernard Diamond, California
Harold Ziskin, Arizona |

Members are reminded that they may make additional nominations of members in their own Regional Territories by the submission of their names by five members in that Territory, to the office of the Association, not later than August 10, 1974.

CONVENTION

All of our members have received literature and reservation forms for our Fourth Annual Convention to be held at the Del Coronado Hotel in San Diego, California, October 27-31, 1974. Reservations are being received daily at the office. Have you sent in your reservations yet? It may seem like a long way off, but plans must be made, so please don't delay -- do it today! And may we again remind you to send in your hotel reservation forms and your Association reservation forms at the same time so that we are able to keep an accurate tally with the hotel of all our registrants.

We are working on the program and hope to be able to release details shortly. We can promise that the business portion of the meeting will be as exciting as the social portion.

NEWSLETTER

AUGUST
1974

National Muffler Dealers Association, Inc., 32 East 57 Street, New York, N. Y. 10022

ASSOCIATION AND MIDAS AGREE ON FUTURE PROCEDURES

MIDAS TO PARTICIPATE IN ASSOCIATION CONVENTION

We published in our last issue of the Newsletter a Statement of Objectives agreed upon at a meeting of Midas with the members of the Dealer Advisory Committee on June 27, 1974. Subsequent discussions were had and an agreement was reached subject to the approval of your Board of Directors. The Board met on July 24, 1974 and unanimously approved both the Statement of Objectives and the agreement.

The Dealer Advisory Committee will continue to act until the time of our Annual Convention next October. The Dealer Advisory Committee will go out of business at that time and in its place there will be an Association appointed committee to deal with Midas in conformity with the previously published Statement of Objectives. The members of the new committee will be selected by the Board of Directors of the Association. The Association will pay the expenses of its designees.

At the same meeting your Board of Directors extended an invitation to Midas to participate in the program at our forthcoming Convention to be held in San Diego at the end of October. Midas accepted the invitation and has agreed to be responsible for one day's program, (the last day) all of the details of which will be worked out between Midas representatives and the Association's program coordinators, Jim Coatsworth and Bill Curran. The Board of Directors also invited Ralph J. Weiger, President of Midas, to speak at our annual banquet and Mr. Weiger graciously accepted.

CONVENTION RESERVATIONS EXCEED EXPECTATIONS

We are delighted at the response received thus far from our members to our Fourth Annual Convention, October 27-31, 1974. We expect shortly to be able to announce the details of what will undoubtedly prove to be a stimulating, informative and exciting program of meetings and round table discussions. We expect a record enrollment and urge all members who have not yet done so to return their reservations as soon as possible. We are enclosing reservation forms for those members.

We remind non-members that they are welcome at the Convention and will be entitled to attend all meetings and social functions except for the closed business meeting. Non-members who are interested in attending the Convention should write to the Association office for details.

RECOGNITION AND THE FUTURE

An Editorial

Those members who have worked unrelentingly for recognition of the Association by Midas are well aware of how important it was finally to achieve that recognition. However, discussions with some members lead us to believe that there is some misunderstanding about the need for recognition, what the Association has accomplished, and what the future prospects may be.

The dealers who founded this Association were realistic enough to know that the very nature of franchising implies an economic imbalance between franchisor and franchisee -- an imbalance that is heavily weighted in favor of the franchisor. In the absence of a resort to legislation or to the Courts, that economic imbalance can only be overcome when franchisees join together for their common good. Our case is a prime example of that principle in successful operation.

Even in the absence of recognition, this Association, because it represented a majority of the dealers, was able to make a tremendous impact in the negotiation of a new franchise agreement, in working out a favorable compromise for the elimination of the guarantee service charge, and for the accomplishment of radical changes in Midas policy which were announced only last month in the report of the last Dealer Advisory Committee meeting. None of this, of course, could have been accomplished without the Association.

Although there had for some time been de facto recognition of the Association, formal recognition was necessary so that a more effective means of communication could be established between dealers and the Company. Recognition is an acknowledgement by the Company of their obligation to deal with franchisees as a group. Recognition means that we are no longer required to go through the back door. Recognition paves the way for the future.

Many problems will arise in the future, some of which cannot now be anticipated. As these problems arise, it is essential that the dealers work together in attempting to reach effective solutions. In effect, as one dealer put it, the Association is every dealer's insurance policy to maintain the value of his franchise. Working together we must be alert to make sure that anything in the future which will affect a dealer's profitability is discussed with the Company -- not on an individual basis but upon the only basis which can be effective -- dealers acting together. We have every reason to believe that the new management at Midas recognizes the value to the entire franchise program of a responsible, widely supported Association of dealers.

Recognition will also be of great value to individual dealers with respect to their individual problems. It will not be necessary for a dealer to act alone on matters of importance. He can have the support of his Association and the expertise of the officers and directors.

INSURANCE REPORT

The Sentry Insurance program for casualty and workmen's compensation insurance has just completed its second quarter and premiums billed are already over the \$100,000 mark, which qualifies us for dividends. Sentry will have representatives at the forthcoming Convention again. Those who attended last year will remember the interesting and informative talks given by Sentry people.

At the request of the insurance company, a Loss Control Committee consisting of Bob Amstadt, Jerry Orns and Bob Walenta was appointed by the Board of Directors. The committee, with representatives of Sentry, will analyze the needs and experience of members and attempt to establish an effective loss control program.

NOMINATIONS FOR BOARD OF DIRECTORS STILL OPEN

In our last Newsletter there was a typographical error and the announcement should have been that Sam Latino was the nominee for the Southern Region and Joseph M. Sipocz the nominee for the Southcentral Region.

One additional nomination has been received to date. Members are reminded that additional nominations, which must be made in writing by at least five dealers in the Region, may be made up to August 10, 1974.

MEMBERSHIP

We welcome the new members who have joined us during the last month and hope to be able to meet them personally at the forthcoming Convention in October. We thank all our members for the great job they are doing in recruiting new members.

We trust that all concerned remember that if a new dealer joins the Association during the first year of his ownership of a shop there is no enrollment fee for membership in the Association.

DEFENDANT'S EXHIBIT C - LETTER FROM MONTE ENGLER
TO INTERNAL REVENUE SERVICE (11/1/72)

MYRON P. GORDON
LEONARD B. FRUTKIN
JACK RABIN
MONTE ENGLER

LAW OFFICES
GORDON, FRUTKIN & RABIN
32 EAST 57TH STREET
NEW YORK, N. Y. 10022
ELDORADO 5-2650

November 1, 1972

Mr. David Landau
Internal Revenue Service
P.O. Box 3100
Church Street Station
New York, N.Y. 10008

Re: M:AU:CON:A:DL
National Muffler Dealers Association
Application for Exemption

Dear Mr. Landau:

Pursuant to our conversation of this date, this is to confirm that on Monday, October 23, 1972, at the annual meeting of the National Muffler Dealers Association, the Association's by-laws were amended to read as follows:

ARTICLE II - MEMBERSHIP

Section 1 - Eligibility for Membership

(a) Any muffler dealer holding a valid franchise as such shall be eligible for membership.

(b) No member may enroll or remain as a member unless all shops under said member's ownership, management or control are also enrolled as members.

Section 3 - Suspension and Cancellation of Membership

(b) Membership privileges of any member shall automatically be canceled in the event that such member no longer retains a valid franchise; except that if such member's franchise has been canceled and the member is contesting such cancellation, he may continue to retain his membership until the final determination of such contest.

Mr. David Landau
Internal Revenue Service

-2-

November 1, 1972

The amendment being in accord with our understanding of October 11, 1972, I trust that the exemption will be issued shortly.

Mr. Gordon and I wish to thank you for your assistance and cooperation in this matter. I look forward to hearing from you.

Very truly yours,

MONTE ENGLER

ME:dh

DEFENDANT'S EXHIBIT D - SOLICITATION OF NEW MEMBERS (11/27/75)

NATIONAL MUFFLER DEALERS ASSOCIATION, INC.

32 EAST 57TH STREET
NEW YORK, N. Y. 10022

ELDORADO 5-2650

November 27, 1975

Dear Fellow Midas Dealer:

As the new President of the National Muffler Dealers Association, in office less than a month, I would like to take this opportunity to introduce myself.

My name is Howard Lichterman and I have been a Midas dealer since May, 1956. If I equate those 20 years with the age of our country, I have been in the Midas business for 10% as long as this country has been a country. I have been as loyal to the Midas business as I have to our country.

Our Association represents 78% of the franchised shops in the United States. In view of the fact that we are now working closely with Midas International officials in a joint endeavor to improve the Midas program, I believe it is to the interest of every dealer that we have 100% representation. Now, for the first time, there is a genuine partnership between Midas, on the one hand, and the dealers, represented by our Association, on the other. Shouldn't you be a part of this partnership?

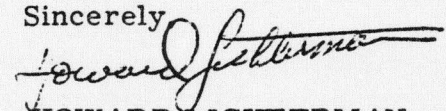
There are a number of areas where Association committees are being set up to assist Midas - at Midas' suggestion - to help make the Midas program an ongoing source of profit for everyone. The areas we are working on consist of:

- | | |
|---------------------------|--------------------|
| 1. New Products | 6. Catalogs |
| 2. Foreign Car Guarantees | 7. Pricing |
| 3. Advertising | 8. Market Research |
| 4. Forms | 9. Growth |
| 5. Computer Services | |

We need your ideas on these and other vital subjects. You need us because together we will improve your business and its profitability.

Enclosed please find membership application. We will welcome you with open arms. If you have any questions, please feel free to call me at 201-673-3000.

Sincerely


HOWARD LICHTERMAN
President

P.S. - We enclose copy of our November Newsletter.

DEFENDANT'S EXHIBIT E - MARKET STUDY (pp. 1-11)



MIDAS IMAGE AND ATTITUDE STUDY

PREPARED FOR: MIDAS INTERNATIONAL

BEST COPY AVAILABLE

August, 1975

#75-1103

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BACKGROUND AND PURPOSE:

Midas International is a major factor in the muffler replacement market. In order to maintain and strengthen this position, a market research project of national magnitude was undertaken.

The overall purpose of this research project is as stated:

"To examine the decision making process used in choosing an exhaust repair shop, focusing upon the specific reasons for selecting or rejecting Midas."

Specific objectives of the study were to determine:

- Attitudes and perceptions of potential muffler replacers toward Midas and their key competitors.
- Attitudes and perceptions of recent muffler purchasers toward Midas and their key competitors.
- Reasons for choosing Midas over competitors. Reasons for choosing competitors over Midas.
- What patterns exist in the process of choosing a muffler shop. Are people who are positively predisposed to purchasing from Midas influenced otherwise as a result of "shopping around".

- On what specific purchase factors does Midas have an advantage/disadvantage over competitors
- Which specific purchase factors do muffler buyers give priority to (e.g. Is price more important than name of shop, is convenience more important than the price, is quantity more important than convenience, etc.)
- Whether patterns and attitudes are consistent in differing geographic regions across the United States.
- Whether patterns and attitudes are consistent in markets which are considered good, average or poor Midas markets.
- What differences, if any, exist among various demographic groups, or groups who have had previous experience with Midas.

STUDY METHODOLOGY:

A three step methodology was employed to accomplish the study objectives, as follows:

1. A "resource" session was conducted with representatives of Midas International and the Midas Dealer organization for the purpose of exploring specific areas of interest for the study. The session lasted approximately 3 hours and produced ideas and thoughts which aided questionnaire construction.
2. A series of in-depth focus group discussions were conducted among:
 - a. a group of men planning the purchase of a muffler
 - b. a group of men who recently purchased a muffler from Midas
 - c. a group of men who recently purchased a muffler from a Midas competitor.

The purpose of these sessions was to explore in-depth consumer attitudes concerning muffler replacement so that no area of importance was omitted from the questionnaire.

3. A total of 1,097 central location WATS* line telephone interviews (1) were conducted in 18 metro markets among men who own automobiles. A respondent was also responsible for the upkeep of the automobile in terms of deciding when and where repairs or replacements are made.

Of the 1,097 interviews, 500 were with men in general who have not replaced the muffler on their car within the past year. The remaining

597 interviews were quota controlled so that an adequate sample of respondents fell into one of the following groups:

- a. past Midas Muffler purchasers within 12 months
- b. past Mass Merchandiser muffler purchaser within 12 months (Sears, Wards, K-Mart, etc.)
- c. past garage/service station purchasers within 12 months
- d. past self-replacers within 12 months
- e. past other muffler special in 12 months
- f. past new car service department replacers within past 12 months.

***Wide Area Telephone Service**

1. Interviewing was personally supervised and monitored by a staff member of Goldring & Company.

Because male heads of household were interviewed, all interviews were conducted during the evening and weekend hours. Each interview lasted approximately 30 minutes. Interviewing was conducted during June, 1975. The following chart shows the number of interviews conducted in the 18 metro markets.

	<u>Total</u>	<u># Of Replacer Interviews</u>	<u># Of Non-replacer Interviews</u>	
New York	191	104	87	1*
Los Angeles	143	78	65	3
Chicago	99	54	45	1
Philadelphia	88	48	40	2
Detroit	63	34	29	1
San Francisco	64	35	29	2
Boston	61	33	28	1
Cleveland	57	31	26	2
Washington	48	26	22	1
Dallas/Ft. Worth	41	22	19	4
Pittsburg	42	23	19	3
Minn./St. Paul	35	19	16	2
St. Louis	34	19	15	1
Miami	33	18	15	3
Atlanta	33	18	15	3
Seattle	29	15	14	2
Charlotte	20	11	7	3
New Orleans	16	9	7	3
Total	1,097	597	500	

* Rated 1 = Excellent Midas Market

Rated 2 = Good Midas Market

Rated 3 = Fair Midas Market

Rated 4 = Poor Midas Market

OTHER STUDY CONSIDERATIONS

1. Markets were selected for this study for their ability to represent both a national picture of the muffler replacer and to represent an aggregate of excellent, good, fair or poor Midas markets. This study is not intended to describe individual market situations. It is intended to provide a view, on a nationwide projectable basis, of the muffler market as a whole and the Midas corporate standing in that market.
2. A great deal of data was generated from the study. This report details that information which was felt to be action-oriented and discriminating. If, for example, age was of influence, this is stated. For those wishing to inspect the detailed data, a copy is available in the research department of Midas International.

WHERE LAST MUFFLER WAS REPLACEDSummary of Replacers

In the past 12 months, 29% of those contacted had replaced their muffler. Of this group, the following table represents where the muffler was replaced:

Have replaced a muffler in past 12 months	29%	5,978
Have not replaced a muffler in past 12 months	71%	14,637
(base contacts)		(20,615)*

Replaced by:

Midas	21%
Replaced by garage/service station	23
Replaced by self	27
Replaced by "other" muffler speciality outlets	11
Replaced by mass merchandiser (Sears, Wards, etc.)	10
Replaced by new car dealer	8
(base)	(842)

8.75 people

* Based on call records kept while interviewing was taking place.

About This Report

This report is broken into five basic sections:

Section I - Summary Of Major Findings

Highlights motorists' attitudes toward muffler repair, specifically focusing upon the image and position of Midas.

Section II - The Overall Analysis Section

Analysis of the exhaust repair aftermarket, based upon questions raised in the management-dealer resource session.

Section III - Marketing Implications

Section IV - Detailed Findings Among Recent Muffler Replacers

Section V - Detailed Findings Among Non-Recent Muffler Replacers

For clarity purposes, the detailed findings of those who have replaced their muffler in the past 12 months is separated from those who have not replaced their mufflers in the past 12 months.

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SECTION I

SUMMARY OF FINDINGS

Summary Of Findings

In the past year, 29% of car owners have replaced a muffler. Of this group Midas holds a 21% share:

Where Last Muffler Was Replaced

Replaced by self	27%	227	
Replaced by garage/service station	23	194	32
Replaced by Midas	21	177	29
Replaced at other muffler specialist	11	93	15
Replaced at mass merchandiser	10	84	14
Replaced at new car dealer	8	67	10
(base)	(842)		615

Additionally, the trend seems to be toward Midas as the outlet of the future. Even though only 21% went to Midas to have their last muffler replaced, almost 30% indicated they would go to Midas for their next replacement:

<u>Will Replace At:</u>	<u>Where Next Muffler Would Be Replaced</u>	
	<u>Have Replaced In Past 12 Months</u>	<u>Have Not Replaced In Past 12 Months</u>
Midas	30%	29%
Self	19	17
Garage/service station	17	17
Other muffler specialist	13	9
Mass merchandiser	10	4
New car dealer	8	14
Don't know	2	11
(base)	(597)	(500)

The name Midas holds the dominant spot in peoples' minds, as far as mufflers are concerned. There is really no other name of major concern as 7 out of 10 people think of Midas, immediately. In contrast, Sears ranks a distant second.

<u>Brands of Muffler</u>	<u>Total Awareness</u>	
	<u>Recent Replacers</u>	<u>Not Recent Replacers</u>
Midas	71%	70%
Sears	12	9
Others	32	32
(base)	(597)	(500)

For those people who come to Midas, guarantee, advertising, fast service and location are of major importance. For those going to a garage or service station, a new car dealer or mass merchandiser to have their muffler replaced, convenience is also important, but trust, reputation, past experience, price and having the right parts on hand, play considerably more important roles. The following table illustrates the major reasons for visiting particular types of muffler outlets.

<u>Reason For Last Replacement</u>	<u>Had Last Muffler Replaced At</u>				
	<u>Midas</u>	<u>Garage/Service Station</u>	<u>New Car Dealer</u>	<u>Mass Merchandiser</u>	<u>Other Muffler Specialist</u>
Guarantee	25%	1%	17%	26%	13%
Location/close to home	21	24	5	25	33
Fast service	18	11	3	6	11
Advertising	18	-	-	6	3
Past satisfaction	15	23	17	5	22
Best price	7	9	2	32	28
Have parts on hand	4	2	22	5	1
Always go there/habit	2	28	18	5	4
(base)	(131)	(126)	(60)	(65)	(79)

People who come to Midas come because of the lifetime guarantee, fast service, convenient location, past experience and good reputation. They come to Midas because Midas has convinced them these things are important. Price is not a major factor for a customer who chooses Midas.

People who don't come to Midas have yet to be convinced they should break old relationships and established rapport (that has been built up through continuous dealing with one particular service station, garage or new car dealer) for the things Midas offers.

A significantly large market of price shoppers exists. Approximately four out of 10 people obtain estimates from competitive sources, but interestingly, few people feel Midas is high priced, as the following table indicates:

<u>Midas Prices Are:</u>	<u>Last Replaced At</u>				
	<u>Midas</u>	<u>Garage/ Service Station</u>	<u>New Car Dealer</u>	<u>Mass Merchan- diser</u>	<u>Other Muffler Specialist</u>
High priced	14%	14%	10%	28%	25%
Competitively priced	66	52	50	45	44
Low priced	8	3	8	6	3
Don't know about Midas' prices	12	31	32	21	28
(base)	(131)	(126)	(60)	(65)	(79)

If people are pure price shoppers and a Midas bid comes in high, there is little Midas will be able to do to sell that customer. It would seem that this group would remain to be convinced if they obtain a high bid from Midas, the extra money they pay will be a worthwhile investment.

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When asked though to rate important characteristics in the selection of a muffler replacement outlet, price was low on the list of important characteristics. The following shows the extent to which people felt key characteristics were important:

Rated Characteristics Very Important To Choosing <u>A Muffler Replacement Outlet</u>	
Know price given won't be increased	76%
Offer speedy service	71
Be conveniently located	65
Have parts on hand for most cars	69
Offer lifetime guarantee	69
Guarantee anywhere in the country	65
Guarantee entire exhaust system	64
Be specialist in the field	60
Know quality of material in muffler	54
Offer service in a personal way	44
Have a clean shop	41
Allow you to watch mechanic do work	40
Have lowest prices I can find	38
Have a comfortable waiting area	36
Allow you to charge the work	33
Make own products	28
(base)	(597)

Based on these ratings, two major things Midas should consider to maintain their leadership position would be telling a customer the price given won't be increased and guaranteeing the entire exhaust system, not just the muffler.

In terms of how people view Midas, Midas customers have a much stronger and positive view of the company when it comes to key areas of importance. The following illustrates these differences:

<u>Key Characteristics</u>	<u>Rated As Describing Midas Very Well</u>				
	<u>Midas</u>	<u>Garage/ Service Station</u>	<u>New Car Dealer</u>	<u>Mass Merchan- diser</u>	<u>Other Muffler Specialist</u>
Specialist in field	85%	62%	58%	63%	62%
Offer lifetime guarantee	79	60	55	62	63
Offer speedy service	81	51	48	51	47
Has a good reputation	76	53	38	46	48
Stands behind work	69	48	42	48	43
Place I can trust	69	41	32	39	46
Know prices given won't be increased	67	29	22	35	42
(base)	(131)	(126)	(66)	(65)	(79)

While ratings were lower for non-Midas customers, these were more reflective of lack of knowledge of Midas than a negative attitude toward the company.

What people say is important in choosing a muffler replacement outlet and what actually becomes important once the need to replace a muffler actually exists are quite consistent. One major aspect of difference is convenience.

Respondents said they would be very interested in coming to Midas if Midas offered the following major characteristics, and as can be seen, many of the top rated characteristics are convenience oriented.

	<u>% Who Would Be Very Interested In Coming To Midas If They</u>
Were conveniently located	61%
Guaranteed entire exhaust system	51
Offered a free loaner car	46
Had a toll-free number to register complaints	45
Said parts as good as original equipment	43
Made and guaranteed their product	43
Let you watch replacement	40
Provided service by appointment	39
(base)	(597)

Because of high customer satisfaction, Midas can be expected to retain a major portion of its current customers, while at the same time generating business of dissatisfied customers of competitors. Almost 90% of current Midas customers will return to Midas, while competitors can expect a lower percentage of repeat business.

Next Muffler Would Be Replaced At	Last Muffler Was Replaced At						Total*
	Midas	Garage/ Service Station	New Car Dealer	Mass Merchan- diser	Other Muffler Specialist	Self	
Midas	89%	17%	12%	12%	10%	12%	30%
Garage/service station	3	67	3	-	5	3	17
New car dealer	2	-	73	-	-	2	8
Mass Merchandiser	5	-	5	66	1	1	10
Other muffler specialist	1	3	3	6	77	2	13
Self	1	6	5	3	1	81	19
Others	1	10	3	8	-	-	3
Don't know	2	3	7	8	6	-	4
(base)	(131)	(126)	(60)	(65)	(79)	(125)	(597)

*Multiple responses

In terms of particular types of customers, the greatest opportunity for increased business would seem to come from the garage/service station and new car dealer customer, as this customer is much less price oriented in his shopping patterns, owing to somewhat higher income profile, in line with the Midas customer, as the following table indicates:

	Muffler Last Replaced At				
	Midas	Garage/ Service Station	New Car Dealer	Mass Merchan- diser	Other Muffler Specialist
Have income under \$25,000	58%	62%	50%	69%	70%
Have income over \$25,000	26	25	37	14	19
No answer	16	13	13	17	11

Differences which exist between people who go to Midas or go to a Midas competitor are based primarily on attitude. As previously stated, garage/service station and new car dealer customers are loyal because of experience built up over time. It would seem important for Midas to somehow attack these attitudes, by building rapport with current customers. A way of doing this is through offering other services.

In Summary

- 1 - The role of advertising is exceptionally important to Midas and is mentioned as a key reason for coming to Midas. The execution of Midas advertising has undoubtedly played a key role in bringing Midas to its strong market position.
- 2 - The self-replacers' market proved to be the largest segment of those replacing their muffler in the past year. Self-replacers are very price oriented and, because of the state of the economy in 1974, the self-replacers' market may have been larger than it would be in a normal year. There is indication of a trend away from self-replacing, yet for Midas to pick up this business would seem problematic owing to the price conscious attitudes of this market.
- 3 - No startling differences in attitudes, opinions or trends occurred among those replacing their muffler in the past year vs. those not having replaced their muffler in the past year.
- 4 - Notably, as most people do not replace a muffler until absolutely necessary, the role of convenience should not be underestimated. Yet, other factors, e.g. price, speed, guarantee continue to be important and should not be underplayed.
- 5 - The Midas position is strong and can be expected to strengthen as new dealerships open, thus making it more convenient to visit a Midas shop. The Midas story of a lifetime guarantee, speedy service, and specialization has penetrated well, yet opportunities exist by moving in other directions. On the basis of consumer attitudes, there seems to be no major obstacles for Midas to overcome in generating an even greater portion of the muffler replacement market.

JUDGMENT APPEALED FROM

PCS:jsw
75-2269

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL MUFFLER DEALERS
ASSOCIATION, INC.,

Plaintiff

- against -

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

75 Civ. 3228 (LWP)

The issues in the above entitled action having been brought on regularly for trial, before the Honorable Lawrence W. Pierce, United States District Judge, on May 24, 1977, and at the conclusion of the evidence the Court having made findings of fact and conclusions of law in favor of defendant, it is

ORDERED, ADJUDGED and DECREED: That defendant UNITED STATES OF AMERICA have judgment against plaintiff NATIONAL MUFFLER DEALERS ASSOCIATION, INC. dismissing the complaint.

Dated: New York, New York

6/6 1977

15/ LAWRENCE W. PIERCE
United States District Judge

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----x
NATIONAL MUFFLER DEALERS
ASSOCIATION, INC.

Plaintiff,

75 Civ. 3228
(LWP)

-against-

NOTICE OF APPEAL

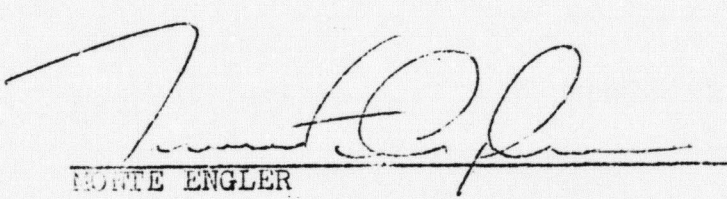
UNITED STATES OF AMERICA,

Defendant.

-----x

NOTICE is hereby given that NATIONAL MUFFLER DEALERS ASSOCIATION, INC., plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the decision and judgment of the above-referenced Court by the Honorable Lawrence W. Pierce dismissing the complaint and rendering judgment in favor of the defendant and against the plaintiff and from each and every part thereof, entered in this action on the 6th day of June, 1977.

Dated: June 23, 1977.


MONTE ENGLER

HOFFBERG, GORDON, RABIN & ENGLER
Attorneys for Plaintiff
32 East 57th Street
New York, N.Y. 10022
(212) EL- 5-2650

To:

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York.
Attorney for Defendant
Office & Post Office Address
One St. Andrew's Plaza
New York, N.Y. 10007

A-275

Clerk of the Court,
United States District Court,
Southern District of New York.
United States Courthouse
Foley Square
New York, N.Y. 10007

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

JAMES LEVACH, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 185 ST. MARKS PL.
STATEN ISLAND, N.Y.

That on the 26 day of AUGUST, 1977,
deponent personally served the within JOINT APPENDIX

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 1 true copy ~~ies~~ of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed~~
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

ROBERT B. FISKE, JR., ESQ
U.S. ATTORNEY FOR THE SOUTHERN DISTRICT OF N.Y.
ATTORNEY FOR DEFENDANT-APPELLEE
ONE ST. ANDREWS PLAZA
NEW YORK, N.Y. 10007

Sworn to before me this

26 day of August, 1977

James Levach

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979